Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

CHRIS WOODALL AND COLUMBIA RIVER GORGE COMMISSION,
Petitioners,

v.

SKAMANIA COUNTY,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Washington

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JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress authorized the states of Oregon and Washington to enter into an interstate compact to develop uniform land use planning standards in the Columbia River Gorge National Scenic Area to protect the area's scenic, cultural, natural, and recreational resources, and to promote growth to occur in existing urban areas. The Columbia River Gorge Commission is the interstate compact agency created by Oregon and Washington. Congress and the states require the Commission to develop uniform standards, approve local ordinances as consistent with the standards and hear appeals concerning counties' application of their ordinances. The Washington Court of Appeals, however, determined that the Gorge Commission, in its appellate role, must interpret a local ordinance in a manner consistent with Washington's law. The question presented is therefore:

Under an interstate compact that does not reserve the states' individual land use standards, is the compact agency entitled to interpret local ordinances implementing the Commission's standards in a uniform manner to achieve the purposes of the Compact even if that interpretation conflicts with state law?

This is an issue of first impression for this court; in 1997, this Court denied the Delaware River and Bay Authority's petition for a writ of certiorari presenting a substantially similar issue.

PARTIES TO THE PROCEEDING

Petitioners, respondents below, are Chris Woodall, an individual, and the Columbia River Gorge Commission, an interstate compact agency, created by the states of Oregon and Washington, Or. Rev. Stat. § 196.150 and Wash. Rev. Code § 43.97.015, with the consent of Congress, 16 U.S.C. § 544c.

Respondent, petitioner below, is Skamania County, a municipal corporation of the State of Washington, organized under Wash. Rev. Code, Title 36, and described under Wash. Rev. Code § 36.04.300.

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JOINT PETITION FOR A WRIT OF CERTIORARI

Chris Woodall and the Columbia River Gorge Commission ("Gorge Commission" or "Commission") petition for a writ of certiorari to review the judgment of the Washington Supreme Court.

OPINIONS BELOW

The Washington Court of Appeals' decision in this case is reported at 16 P.3d 701, 104 Wash. App. 525, and is reprinted in the appendix at 2a. The Washington Supreme Court denied review of this case. Its denial of review, reported at 2001 Wash. LEXIS 651, is reprinted in the appendix at 1a. The Court of Appeals' decision reversed the decision of the Skamania County Superior Court, which is unreported and is

reprinted in the appendix at 18a. The Superior Court's decision upheld the decision of the Columbia River Gorge Commission, which is unreported and reprinted in the appendix at 27a. The Gorge Commission's decision reversed the decision of the Skamania County Board of Adjustment, which is unreported and reprinted in the appendix at 36a.

JURISDICTION

The judgment sought to be reviewed is the decision of the Court of Appeals of the State of Washington, which was filed on January 26, 2001. On October 4, 2001, the Supreme Court of the State of Washington denied Chris Woodall and the Columbia River Gorge Commission's Joint Petition for Discretionary Review of the decision of the Court of Appeals. The Court of Appeals' decision became the decision terminating review of the case on October 4, 2001. Jurisdiction of this Court is thus pursuant to 28 U.S.C. § 1257(a).

Additionally, jurisdiction of the Court is proper because the questions presented here involve the construction of an interstate compact, the Columbia River Gorge Compact, Wash. Rev. Code § 43.97.015; Or. Rev. Stat. § 196.150, authorized by the Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544c. The construction of an interstate compact sanctioned by Congress by virtue of Article I, Section 10, Clause 3 of the U.S. Constitution, involves a federal title, right, privilege or immunity that presents a federal question. *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419, 427–28 (1940). This Court is the ultimate arbiter over the meaning of a compact. The Supreme Court has final power to pass upon the meaning of compacts. *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Art. 1, Sec. 10, Cl. 3: "No state shall, without the consent of Congress, * * * enter into any agreement or compact with another state * * *."

Federal Statutes

Pub. L. No. 99-663, 100 Stat. 4274 (1986) (*codified as amended at* 16 U.S.C. §§ 544–544p): Columbia River Gorge National Scenic Area Act, set forth at Appendix F, page 61a.

Columbia River Gorge Compact

Wash. Rev. Code § 43.97.015 and Or. Rev. Stat. § 196.150 set forth at Appendix G, page 108a.

Local Ordinances

Skamania County Code § 22.06.090(2): "Replacement or reestablishment of a use or structure discontinued for one year shall be subject to the provisions of this Title."

INTRODUCTION

The United States Constitution, in allowing states to enter into compacts with each other, recognizes that "[c]reativeness is called for to devise a great variety of legal alternatives to cope with the diverse forms of interstate interests." Felix Frankfurter and James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 688 (1925). States employ interstate compacts to allocate water from interstate rivers, obtain jurisdiction for child custody disputes, manage land resources, and handle myriad other regional problems.

In this case, the Washington Court of Appeals determined that the Gorge Commission, an interstate compact agency, must interpret its regional zoning standards consistent with

Washington's zoning law, rather than uniformly across the two-state region established by Congress. This case raises the important issue of whether a compact agency may interpret and apply its compact and administrative rules in manner that is uniform among the compacting states to achieve the purposes of the compact, even if that interpretation conflicts with state law. This is an issue of first impression for this Court. In 1997, this Court denied a petition for a writ of certiorari by the Delaware River and Bay Authority raising the same issue.

There are three reasons why this Court should grant this petition. First, this case conflicts with precedent from this Court, federal circuits, and other state courts concerning when a compact agency is bound by state law. Second, this case limited Congress's prescribed management of the National Scenic Area. Third, the Supreme Court has reserved for itself the final word on construction of interstate compacts to protect against local bias.

STATEMENT OF THE CASE

Just east of Portland, Oregon and Vancouver, Washington, the Columbia River carved a 75 mile passageway through the Cascade Mountain Range at near sea level, forming the Columbia River Gorge.

> Standing at the margin of the river and looking up along the skyline, one sees rim rock of the mountain, in many places, thousands of feet above. The crystal waterfalls, the great trees, the fresh green moss—the rocks themselves speak of eternal youth, and it seems but yesterday that the hand of God fashioned it all.
>
> The talus at the base of the cliffs tells a different story. We read in these masses of broken stone that centuries on centuries have passed since they began to form, for every particle contained in them, when loosened by frost, heat or cold, fell from dizzying heights piece by piece. * * * The rich growth of vegetation, almost

> tropical always hastening to hide nature's secrets, soon covers them, and out of this mouldering mass provide food and shelter for man and beast.

Samuel C. Lancaster, *The Columbia—America's Great Highway*, 19 (1926).

Today, the Gorge forms a portion of the border between Oregon and Washington and continues to be an area of breathtaking scenery, myriad recreational opportunities, and flora and fauna that appears nowhere else. It is also an area of rich important history. Lewis and Clark traveled through the Gorge and camped on the banks of the Columbia on the final leg of their historic 1805 expedition. Sam Hill, lawyer, good roads advocate, and entrepreneur, together with Sam Lancaster built the Columbia River Highway to rival the great roads of Europe, and which President Wilson dedicated in 1916. Native American peoples have used the Gorge for over 10,000 years and continue to have treaty rights to its land and water.

Washington and Oregon have jointly managed the Columbia River's fisheries and electricity generation for a long time.[1] The states, however, could not agree how to manage the Gorge. In 1935, the Pacific Northwest Regional Planning Commission recommended joint management of the area for the first time in the form of an interstate park. Columbia Gorge Committee, Pacific Northwest Regional Planning Comm'n, *Land Program Recreational Project: Columbia Gorge Washington-Oregon*, 1 (1935) (on file with the Oregon Historical Society). In the 1950s, the states created parallel advisory commissions to protect the Gorge scenery. The

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[1] *See* Or. Rev. Stat. § 507.040 and Wash. Rev. Code § 43.52A.010 forming the Columbia River Compact (fisheries) and Pub. L. No. 96-501, 94 Stat 2697 (codified as amended in scattered section of 16 U.S.C.), authorizing Oregon, Washington, Idaho, and Montana to form the Pacific Northwest Electric Power Planning and Conservation Council (electricity generation).

effectiveness of these advisory commissions was "hampered by their advisory authority, meager funding, and by hostility from certain counties in the Gorge, particularly Skamania." Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 Envt'l. L. 863, 879 (1987).

Additionally, because the two states had conflicting approaches to land use, it was essential to adopt uniform standards that transcended prior state law. *Id.* at 872; Lawrence Watters, *The Columbia River Gorge National Scenic Area Act*, 23 Envt'l. L. 1127, 1128–29 (1993). *See also* Robert Packwood, *The Columbia River Gorge Needs Federal Protection*, 15 Envt'l. L. 67 (1988); 132 Cong. Rec. 29,498 (1986) (statement of Sen. Packwood (Oregon)); *id.* (statement of Sen. Evans (Washington)).

A. The Columbia River Gorge National Scenic Area Act and Columbia River Gorge Compact.

In 1986, Congress took note that the two states' individual land use planning could not effectively manage the land resources, and passed the Columbia River Gorge National Scenic Area Act ("Scenic Area Act" or "Act"), Pub. L. No. 99-663, 100 Stat. 4274 (1986), *codified as amended at* 16 U.S.C. § 544–544p (1994). During the congressional debates, Rep. Robert Smith (OR) proposed to amend the Act requiring the National Scenic Area standards to be no more restrictive than Oregon's existing land use standards. 132 Cong. Rec. 32,245 (1986). The proposed amendment was resoundingly defeated. *Id.* at 32,247. Rep. Morrison (WA) argued that deferring to one state's land use law was neither appropriate nor fair. *Id.* at 32,246. Rep. AuCoin (OR) agreed with Rep. Morrison. *Id.* Rep. Weaver (OR) also rejected the proposed amendment based on the fact that it would cause different land use standards between the states. *Id.* Rep.

Vento (MN) similarly rejected the amendment based on the lack of uniformity and because deference to state law would merely maintain the status quo of land use regulation. *Id.*

The Act created the 285,000-acre Columbia River Gorge National Scenic Area in both states. The primary purpose of the Act is to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge. 16 U.S.C. § 544a. The second purpose of the Act is to provide for economic development consistent with the first purpose. *Id.*

The federal legislation was Congress's preauthorization to an interstate compact between Washington and Oregon. 16 U.S.C. § 544c. Pursuant to the Act, Washington and Oregon adopted a compact, which created the Columbia River Gorge Commission to manage development within the National Scenic Area consistent with the Act. Wash. Rev. Code § 43.97.015; Or. Rev. Stat. § 196.150. As a condition to its consent to the compact, Congress specifically required the Gorge Commission to possess the powers necessary to implement the legislation. 16 U.S.C. § 544o(d).

State law provides the Gorge Commission explicit authority to carry out the Act. Wash. Rev. Code § 43.97.025(1); Or. Rev. Stat. § 196.155. The Act and Columbia River Gorge Compact thus created a regional approach to resource protection and economic development in the Gorge that could not have been achieved by the individual states acting alone. The Compact has been characterized as "an innovative solution to a difficult interstate land management problem." *Columbia River Gorge United v. Yeutter*, 960 F.2d 110, 114-15 (9th Cir.), *cert. denied sub nom, Columbia River Gorge United v. Madigan*, 506 U.S. 863 (1992).[2]

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[2] The *Columbia River Gorge United* case established that the National Scenic Area Act does not violate the Commerce Clause, Property Clause, Equal Protection Clause or the Tenth Amendment, and that the Columbia River Gorge Compact is valid under the Compact Clause.

The Act specified minimum land use standards, 16 U.S.C. § 544d(d), and required the Gorge Commission and the United States Secretary of Agriculture[3] to develop a management plan governing all land use and development in the Scenic Area. 16 U.S.C. §§ 544d, 544f. The Act seeks to channel urban-style development into existing urban areas. 16 U.S.C. §§ 544a, 544b(e)–(f), 544d(d). Unlike the only other interstate comprehensive land use planning compact, the Tahoe Regional Planning Compact, the Columbia River Gorge Compact does not require the Gorge Commission to consider existing land use standards when developing the Management Plan.[4] Counties are required to adopt and implement land use ordinances consistent with the Management Plan for non-federal lands. 16 U.S.C. §§ 544i, 544*l* & 544n(c). These ordinances are subject to approval of both the Gorge Commission and the Secretary of Agriculture. 16 U.S.C. §§ 544e(b), 544f(h). If a county does not adopt a consistent ordinance, the Gorge Commission must adopt and implement one for that county. 16 U.S.C. § 544e(c). Appeals of county decisions implementing the Act must be brought to the Gorge Commission. 16 U.S.C. § 544m(a)(2). The Secretary of Agriculture reviews proposed uses of federal lands, and all federal actions, even those on private land, for consistency with the Management Plan. 16 U.S.C.

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[3] The U.S. Forest Service acts for the Secretary of Agriculture. It has a National Scenic Area Office dedicated to implementing the Act.

[4] The Tahoe Compact provides:

> In formulating and maintaining the regional plan, the planning commission and governing body shall take account of and shall seek to harmonize the needs of the region as a whole, the plans of the counties and cities within the region, the plans and planning activities of the state, federal, and other public agencies, and non-governmental agencies and organizations which affect or are concerned with planning and development within the region.

Cal. Gov't Code § 66801, Art. V(c)(5) (1997); Nev. Rev. Stat. § 277.200, Art. V(c)(5) (1997).

§§ 544f(a); 544*l*(d). Both the Gorge Commission and the Secretary of Agriculture have specific authority to enforce the Act. 16 U.S.C. § 544m(a)–(b). The result is that all land uses within the Scenic Area, whether private, state, or federal, must be consistent with the Management Plan. *Columbia River Gorge United*, 960 F.2d at 112.

The Act also recognizes that federal lands play a vital role in achieving the purposes of the Act. Nearly 50% of the land area in the National Scenic Area is owned by the federal government. *Management Plan for the Columbia River Gorge National Scenic Area* at 20. These lands must be used in accordance with the Act. 16 U.S.C. § 544f(a). The Act provides funds to the Secretary of Agriculture for acquisition of private land so that lands with especially high resource value can be purchased as an alternative to regulation. 16 U.S.C. § 544g(a)-(g). The Act even allows land exchanges as an alternative to purchase. 16 U.S.C. § 544g(d).

Finally, the Act provided that appeals of Gorge Commission decisions must be brought in the state courts of Washington and Oregon. 16 U.S.C. § 544m(b)(6). Federal Court jurisdiction is reserved only for matters concerning actions by the Secretary of Agriculture. 16 U.S.C. § 544m(b)(5).

B. Facts and Posture of this Case

In 1995, Scott Anderson, who is not a party to this appeal, filed an application to redevelop a ten-site trailer park that had existed on the property sometime in the past. Administrative Record before the Skamania County Board of Adjustment ("AR") at 206-15. The property is located within a Special Management Area in the National Scenic Area. AR at 216. Special Management Areas are so designated for their especially significant scenic, cultural, natural, and recreational values. *See* 16 U.S.C. § 544f. Under current Skamania County zoning, adopted to be consistent with the Management Plan, trailer parks are not a permitted use within the

Special Management Areas. *See* Skamania County Code § 22.20.080; 16 U.S.C. § 544d(d)(5). Prior uses that have not been discontinued for more than one year may continue to operate. Skamania County Code § 22.06.090(2). The term "discontinued" is not defined in the Management Plan or the Skamania County Code. The Gorge Commission has previously determined that a use is "discontinued" if it has ceased for one year. *Andersen v. Columbia River Gorge Comm'n*, No. 18370-6-II, slip op. (Wash. App. Dec. 13, 1996).

The Skamania County Planning Director approved the application. AR at 112-15. Chris Woodall appealed the decision to the Skamania County Board of Adjustment. AR at 106-09. The Board of Adjustment determined that the ten-site trailer park was a nonconforming use that had not been discontinued because Woodall had not demonstrated that the property owner intended to abandon the use of the property as a ten-site mobile home park. AR at 10-11. Washington law requires a showing of intent to abandon to prove "discontinuance." *King County v. High*, 219 P.2d 118, 119 (1950). Subsequently, the property was sold to Richard Bassett and David Payton. AR at 76. These parties appeared as intervenors in the appeal before the Gorge Commission, *Woodall v. Skamania County*, CRGC No. COA-S-96-01 at 1 (Jan. 7, 1997), Clerk's Papers ("CP") at 6, but did not participate in subsequent judicial review.

Woodall appealed to the Gorge Commission. AR at 3-7. In his appeal, Woodall argued that the Columbia River Gorge Compact did not allow the County to apply Washington law. CP 8-9. The Gorge Commission found that the Board of Adjustment had applied the wrong legal standard to determine whether a nonconforming use in the Scenic Area has been discontinued. CP at 14. The Gorge Commission held, consistent with its prior interpretation, that a nonconforming use in the Scenic Area is "discontinued" upon mere cessation of the use for one year, as opposed to Washington's

subjective standard. It remanded the case to the Board of Adjustment to reevaluate the permit in light of this conclusion. CP at 11-14.

Skamania County appealed the Gorge Commission's order to Skamania County Superior Court. CP at 1. The Columbia River Gorge Commission intervened. The Superior Court found in favor of Woodall and the Gorge Commission. CP at 185-91.

Skamania County appealed the Superior Court's decision to the Washington Court of Appeals. The Court of Appeals reversed the decision of the Gorge Commission. 16 P.3d at 703. The Washington Supreme Court denied review of the case. 2001 Wash. LEXIS 651.

The Washington Court of Appeals gave six specific reasons why it believed the Columbia River Gorge Compact requires the Gorge Commission to apply Washington's common law. First, the Court of Appeals reasoned that if Congress wanted the Gorge Commission to apply federal law, then it would have made the Commission a federal agency.[5] Second, the Court of Appeals reasoned that if Congress wanted the Commission to apply federal law, then it would have placed appeals from Commission actions in the federal courts. Third, the Court of Appeals reasoned that reviewing the Commission's actions under federal law would raise the specter of federal zoning.[6] Fourth, the Court of Appeals reasoned that Congress's approval of the Compact suggested that it wanted the Commission to apply state law because the Compact specifies: "the provisions of [the Compact] are

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[5] Recall, *supra*, that Congress designated the provisions of the Compact and the make-up of the Gorge Commission for the states to adopt. 16 U.S.C. § 544c.

[6] The Court noted that a substantial amount of the Commission's work is zoning and that there is no federal law of zoning, so it is unclear what law courts would apply.

declared to be the law of this state" (citing Wash. Rev. Code § 43.97.015). Fifth, the Court reasoned that (1) Congress "had to know" that absent a command in the Act to apply federal law, Washington state courts are required to apply Washington state common law, and (2) the Compact did not expressly authorize the Commission to ignore Washington common law. Finally, the Court reasoned that because the "discontinued" standard at issue is a question of vesting under Washington law, and the Gorge Commission and U.S. Forest Service chose in the Management Plan to defer to state law for resolving questions of vesting, then the "discontinued" standard at issue must be decided in accordance with Washington law.[7] *Id.*

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' decision conflicts with this Court's Compact Clause precedents and with the precedents of federal circuit courts and state courts.

This case presents a basic constitutional question involving the Compact Clause: whether in the absence of express language in a compact, a state may impose its own state law on an interstate compact agency. The Washington Court of Appeals determined that absent an express rejection of state law, the Columbia River Gorge Compact contained indicia of

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[7] No party ever argued that the issue in the case raised a question of vesting. The concept of vesting also differs between the states. "Vesting" in Washington refers to the right to have an application considered under the standards effective at the time a complete application was submitted. 16 P.3d at 707. The Court of Appeals noted that in Washington, the right to continue an existing use notwithstanding a zoning ordinance which would prohibit that use is sometimes referred to as a vested right. *Id.* In Oregon, vesting refers to the right to complete a use that been started, and for which there has been a substantial expenditure in reliance of the permit. *See e.g. Clackamas County v. Holmes*, 508 P.2d 190, 197 (Or. 1973).

Congress's intent that the Columbia River Gorge Commission must apply Washington's state common law of zoning. 16 P.3d at 705–07. This conclusion conflicts with this Court's Compact Clause precedent and the decisions of federal circuits and other state courts.

This is an issue of first impression for this court. This issue was presented to this Court five years ago in a petition for a writ of certiorari, but the Court denied the petition. *Delaware River and Bay Authority v. International Union of Operating Engineers, Local 68*, 522 U.S. 861 (1997) (No. 97-81). This case is discussed below.

Here, the Compact does not expressly reserve the states' individual zoning laws.[8] To have done so would have conflicted with Congress's intent of managing the bi-state area uniformly, particularly by protecting the Gorge resources and channeling development into existing urban areas. 16 U.S.C. § 544a. Yet that is the result of the Court of Appeals' decision here. The determination whether an urban-style development in a special management area, such as the trailer park here, can restart after a lengthy period of non-use is precisely the type of land use planning that Congress intended for the National Scenic Area.

Nationally, this issue is of critical importance to all interstate agencies. Interstate compact agencies need certainty about whether they are free to act unrestricted by the bounds of the states' laws in order to achieve the very purposes for which the states entered into the compact. Because the Court of Appeals' decision conflicts with well-established precedent, it creates uncertainty.

This Court has for a very long time recognized that a state cannot impair its obligations under a compact. *Green v.*

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[8] The Act does expressly preserve the states' laws concerning administrative procedures, water rights, and hunting and fishing. 16 U.S.C. §§ c(b), 544o(a)(3) and 544o(a)(8).

Biddle, 21 U.S. (8 Wheat) 1, 40 (1823) ("In fact, the terms compact and contract are synonymous. * * * [A] state has no more power to impair an obligation into which she herself has entered than she can the contracts of individuals."); *State ex rel. Dyer*, 341 U.S. at 28 ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States."); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) (In discussing whether Port Authority was a state agency for the purposes of the Eleventh Amendment, this Court noted that "no one State can control the course of a Compact Clause entity").

Here, the Court of Appeals' determination that the Gorge Commission must apply Washington's common law of zoning conflicts with this Court's precedent because it nullifies uniformity of land use in the National Scenic Area, which Congress stated was necessary to protect the Gorge resources. It nullifies the very purpose of the Act. The Court of Appeals' decision also conflicts with the precedent of federal circuit courts and state courts that have previously determined the circumstances under which an interstate compact agency is subject to the state law of the compacting states.

The federal circuit courts typically require express language in a compact before determining that state law applies. *See, e.g., Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Cons. Planning Council*, 786 F.2d 1359, 1371 (9th Cir. 1986) ("A state can impose state law on a compact organization only if the compact specifically reserves the right to do so."); *Pievsky v. Ridge*, 98 F.3d 730 (3rd Cir. 1996) ("The interpretation of the Compact must be grounded and based upon the very language of the instrument

* * *. [The Compact] does not explicitly state whether the commissioners may be removed by the governor prior to the expiration of their term.").[9]

Likewise, state courts have generally looked to the express language of the compact to determine the applicability of state law. *See, e.g., Delaware River Port Authority v. State Ethics Comm'n.*, 585 A.2d 587, 588 (Pa. Commw. 1991) ("Bi-state agencies such as the [Delaware River Port] authority do not exist in a vacuum and are not immune from regulation. Such regulation can take several forms. First, the member states can pass substantially similar legislation, *as contemplated by the compact.*") (emphasis supplied); *Malverty v. Waterfront Comm'n of New York Harbor*, 524 N.E.2d 421, 422 (N.Y. 1988) ("That the two States have evinced the same or similar public policy regarding employment opportunities for former inmates by enacting similar 'antidiscrimination' laws * * * is not sufficient under the express terms of the 'Compact' to render it properly amended or supplemented such that the Commission would be subject to the provisions of article 23-A."); *Salmon for All v. Department of Fisheries*, 821 P.2d 1211, 1216 (Wash. 1992) (Compact body regulating the Columbia River fishery not subject to state open public meetings act under *Seattle Master Builders* standard).[10]

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[9] The federal district courts follow the circuit courts. *See, e.g. Klickitat County v. Columbia River Gorge Comm'n.*, 770 F.Supp 1419, 1429 (E.D. Wash. 1991) (expressly following the *Seattle Master Builders* standard in determining that the Gorge Commission is not subject to Washington's State Environmental Policy Act); *Alcorn v. Wolfe*, 827 F.Supp. 47, 52-53 (D.D.C. 1993) (terms of the Metropolitan Washington Airports Authority take precedence over conflicting state law).

[10] It is curious that the Washington Supreme Court did not review the instant case given its obvious conflict with its own precedent, but as noted above, this Court has stated that it has the final say on construction of an interstate compact. *State ex rel. Dyer*, 341 U.S. at 28.

Yet, the Court of Appeals here ignored these holdings and looked for an express rejection of state law rather than an express authorization. 16 P.3d. at 706. The Court of Appeals created its own test, further muddying this area of law.

The one exception to the "express language" trend (in addition to the instant case) is a line of cases allowing states to enforce "complementary or parallel" legislation. *Ampro Fisheries, Inc. v. Yaskin*, 606 A.2d 1099, 1103 (N.J. 1992) (A bi-state agency is subject to complementary or parallel legislation that does not intrude on its mission). The *Local 68* case, in which this Court denied the Delaware River and Bay Authority's 1997 petition for a writ of certiorari, followed the *Ampro Fisheries* test, *i.e.*, compact agency subject to state law that is "complementary or parallel" and does not intrude on its mission. *International Union of Operating Engineers, Local 68, AFL-CIO v. Delaware River and Bay Auth.*, 688 A.2d 569, 575 (N.J. 1997). The Delaware River and Bay Authority's petition to this Court argued that this "complementary or parallel" test conflicts with the precedents requiring that the express language be considered. In that case, the New Jersey Supreme Court applied New Jersey law *requiring* the compact agency to engage in collective bargaining even though the Compact specified the agency *may* choose whether to engage in collective bargaining.

The instant case raises an even more compelling conflict between the law as uniformly interpreted by the compact agency and the law of an individual compact state. Here, the Washington Court of Appeals determined that the Gorge Commission must apply Washington state common law of zoning because neither the Scenic Area Act nor the Columbia River Gorge Compact expressly rejected Washington common law. Instead of looking at the express language of the Compact, consistent with federal and state court precedent,, the Court gave meaning to the compact's silence. Additionally, even if the "complementary or parallel" standard

were applied in this case, application of Washington state zoning law would intrude on the mission of the Gorge Commission—to bring uniform land use standards to the National Scenic Area in order to protect and enhance the Gorge resources.

Congress recognized that Oregon and Washington have taken different approaches to land use planning. 132 Cong. Rec. 32,192 (1986). In Oregon, the state has devised 19 statewide planning goals,[11] and specifies minimum (and in some cases maximum) land use standards in its statutes. All local governments must adopt land use ordinances that are consistent with the goals and the statutes. *See generally* Or. Rev. Stat. Titles 197 and 215. In Washington, the state has adopted a Planning Enabling Act, as well as a Growth Management Act, which requires only fast-growing cites and counties to plan, and does not contain specific statutory standards for local planning. *See generally* Wash. Rev. Code Title 43. The Scenic Area Act is the mechanism for the Gorge Commission and Secretary of Agriculture to provide uniformity of zoning between Oregon and Washington in the National Scenic Area.

This Court should accept this case because it conflicts with the established precedent of this Court, federal circuit courts, and state courts. This case is the second recent case to ask this Court to clarify when state law applies to a compact agency. A decision from this Court is necessary to bring clarity to this important issue arising under the Compact Clause.

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[11] Or. Admin R. §§ 660-015-0000–0010.

B. The Court of Appeals' decision infringes on Congress's prescription for uniform management of the National Scenic Area.

The Court of Appeals characterized the issue in this case as a choice of law question: federal law or state law. The Court concluded that federal law is the rule of decision, but then, under the guise of applying federal law, determined that state common law of zoning controls questions of interpretation of the regional management plan. The factors that the Court of Appeals relied on[12] are not determinative of a choice of law question and infringe on matters that Congress has long had the freedom to specify in its legislation.

Congress has prescribed a land use planning system for the Columbia River Gorge National Scenic Area. That system requires a regional management plan prepared by an interstate compact agency and the Secretary of Agriculture, the provisions of which apply to all land within the Scenic Area (whether in Washington or in Oregon, private or public). *See* 16 U.S.C. § 544d; *Columbia River Gorge United*, 960 F.2d at 112. In this case, the Court of Appeals improperly gave a role to conflicting state law in managing the land resources of the National Scenic Area. *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (State law is preempted when it would hinder accomplishment of the full purposes and objectives of the federal law).[13]

The Court of Appeals' first reason is that Congress could have made the Gorge Commission a federal agency. But agencies created by interstate compacts are rarely, if ever, created to be federal agencies. Nor are they created to be state agencies, because "ultimate control of every state-created entity resides with the State, for the State may

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[12] The factors are listed above in the Statement of the Case.

[13] Although the issue of preemption was not prominent in the briefing and court opinions below, it is one way of analyzing the choice of law issue.

destroy or reshape any unit it creates." *Hess*, 513 U.S. at 47. An interstate or regional agency must be free of State dominion or control: "bi-state entities created by compact * * * are not subject to the unilateral control of any one of the States that compose the federal system." *Id.* at 42; *See also, Id.* at 47 ("No one State alone can control the course of a Compact Clause entity."); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 314, 316 (1990) (No single State has dominion over an entity created by interstate compact.).

The Washington Court of Appeals' reliance on the fact that Congress could have made the Gorge Commission a federal agency simply cannot be a determinative factor in the question of whether the Gorge Commission must apply state law. If only federal agencies are exempt from applying the states' laws, then Congress would be limited in its ability to design a management program such as the Columbia River Gorge National Scenic Area Act. As a practical matter, Congress could only create federal management in the traditional sense when it wants to supercede state law, instead of allowing the states to create their own interstate agencies. It is particularly frustrating to congressional intent here where Congress has given some management responsibility to the Gorge Commission and some to the federal government in a careful balance that provides uniformity throughout the bi-state area. As noted above, the National Scenic Area Act was passed largely due to the inconsistent approach of the two states with respect to regulating the Columbia River Gorge, but also with the recognition that federal lands play a vitally important role in achieving the purposes of the Scenic Area.

The Washington Court of Appeals also relied on the fact that Congress provided state courts with jurisdiction over challenges to Gorge Commission decisions to indicate that Congress intended the management plan be construed consistent with state law. 16 P.3d at 706. It cited no authority for this proposition. Again, this factor has nothing

to do with choice of law, but implies that Congress cannot freely choose state court jurisdiction. Congress had several choices regarding jurisdiction for challenges arising under the Scenic Area Act. Because the Compact is federal law, Congress could have been silent on the matter and left jurisdiction up to general jurisprudential concepts. In that event, federal courts would have had jurisdiction. But Congress instead divided jurisdiction: challenges to Gorge Commission decisions are in state court, while challenges to Secretary of Agriculture decisions are in federal court. 16 U.S.C. § 544m(b). The fact that Congress chose the latter option does not mean that state law applies to challenges to Gorge Commission decisions.[14]

A third reason cited by the Court of Appeals was that Congress's approval of the Compact suggests it wanted the Gorge Commission to apply state law. The Court relied on the fact that "Congress approved the Compact, knowing it expressly provided that 'the provisions of [the Columbia River Gorge Compact] hereby are declared to be the law of the state." 16 P.3d at 706 (citing Wash. Rev. Code § 43.97.015).

The Washington statutory provision relied upon by the Court of Appeals had not been enacted at the time Congress approved the Compact; it was negotiated with Oregon. *See* Or. Rev. Stat. § 196.150 (containing the identical language). This language is no more than the state incorporating the provisions of the Act and subjecting itself to the dominion of

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[14] Dual jurisdiction is common for interstate agencies. Under many interstate compacts, some legal challenges are to be brought in state court and some are to be brought in federal court. For example, in *Brooklyn Bridge Park Coalition v. Port Authority of New York and New Jersey*, 951 F. Supp. 383 (E.D.N.Y. 1997), Plaintiffs brought claims based on both federal and state law against the Defendant, an interstate compact agency. One of the issues involved jurisdiction of the respective courts. The Court held that certain claims were appropriate in federal court and certain claims were appropriate in state court. *Id.* at 395.

the Columbia River Gorge Commission. Because interpretations of compacts are pursuant to federal law, by enacting Wash. Rev. Code § 43.97.015 and making it "the law of this state," the Washington legislature agreed to the management scheme set forth in the Act, and assured that the state, its agencies, and political subdivisions would be bound by the Compact, not vice-versa.

Fourth, the Court of Appeals observed that there is no federal law of zoning and that allowing the Gorge Commission to interpret the Compact without regard to Washington law would raise the specter of federal zoning. 16 P.3d at 706. While it may be true that there is no federal law of zoning, application of federal law here, as has been this Court's precedent, does not amount to an overlay of federal zoning because it is the Gorge Commission, a bi-state agency, that develops and interprets the law for all but federal lands. The only "federal zoning" in the Scenic Area is the use of federal lands, which Congress properly decreed would be managed in accordance with the Act. Congress's intent was that the Management Plan bring *uniformity* of zoning to the federally designated National Scenic Area. Limiting the Plan's effect by requiring it to be interpreted only consistent with state law would bring merely a return of the previous status quo, frustrate congressional intent, and create uncertainty for the Secretary of Agriculture as to whether it too must apply state law for federal actions and federal lands.[15]

Scholars of interstate compact law have suggested a "functional choice of law rule" concerning application of state law to a compact agency. Note, *Charting No Man's*

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[15] The Court of Appeals decision would either require the Secretary of Agriculture to apply Washington law, or result in further non-uniformity of land use. Federal lands and federal actions would be subject to the Management Plan standard, all other land uses and actions could be subject to state law.

Land: Applying Jurisdictional and be applied Choice of Law Doctrines to Interstate Compacts, 111 Harv. L. Rev. 1991, 2005 (1998). This Court's precedent has considered when federal courts should adopt state law as the rule of decision. State law should *not* be absorbed when it is adverse to policy goals, programs, or other interests, nor when uniformity is important. *Id.* at 2005–06 (citing *inter alia United States v. Kimball Foods, Inc.*, 440 U.S. 715, 728 (1979) ("When there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision."); *See also, United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 597 (1973) (noting that to adopt state law on the issue in conflict would "deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act."). Here, where the function of the Act and the Columbia River Gorge Compact is to create uniformity in order to protect the Gorge resources, a functional approach dictates that state law should *not* be incorporated. This case provides this Court an opportunity to employ a functional approach to achieve the purposes of the interstate compact. Rather than choose between state law and federal law, the choice should be between state law or the uniform law of the Management Plan as interpreted by the interstate compact agency.

The various authorities and roles for the federal government, states, local governments, and the Gorge Commission were carefully crafted by Congress. As noted above, the Ninth Circuit described the compact as "an innovative solution to a difficult interstate land management problem." *Columbia River Gorge United*, 960 F.2d at 114-15. A decision from this Court is necessary to underscore that the mere existence of creative terms in a compact agreed to by the states, such as here, does not fundamentally change the intent and purpose of the Compact. *See e.g., Seattle Master Builders Ass'n*, 786 F.2d at 1364 ("An unusual feature of a compact does not make it invalid.") citing Frankfurter and Landis, *supra.* at 688.

C. The Washington Court of Appeals improperly favored its own laws when resolving this choice of law issue.

In this case, the Washington Court of Appeals interpreted the Columbia River Gorge Compact to favor its own laws without regard to the regional approach that is the very *raison-d'etre* of interstate compacts. This Court however, has recognized that a state court cannot have the final say on the construction of an interstate compact. *State ex rel. Dyer*, 341 U.S. at 28 ("The meaning of a Compact is a question on which this Court has the final say.").

In this case, the Washington Court of Appeals distinguished between statutory law and common law, specifying only that common law is applicable. 16 P.3d at 709. This case illustrates the anomalous result of the Court of Appeals' distinction. The nonconforming use standard at issue is a common law principle in Washington, 16 P.3d at 707, but is statutory in Oregon, Or. Rev. Stat. § 215.130. Under this distinction, Washington law would apply to Scenic Area lands in Washington because it is common law, but the Management Plan would supercede Oregon's statutes concerning the exact same principles. This certainly cannot have been the intent of Congress.

The Washington Court of Appeals' decision in this case may be explained by local bias. Long before either Oregon or Washington was a state, the Framers of the Constitution noted that state courts were more inclined to be biased against foreigners as compared to federal courts. *The Federalist* No. 80 (Alexander Hamilton). Congress addressed Hamilton's prediction of overbearing state courts quickly. Section 25 of the Judiciary Act of 1789 was enacted to protect against state disobedience of national authority. Wright and Miller, 16B Fed. Prac. & Proc. Juris. 2d § 4011. Additionally, Felix

Frankfurter and James Landis, authors of the seminal 1925 article on interstate compacts cited above, also wrote:

> The framers of the Judiciary Act guarded against the danger of state judges whose inclination towards support of action by their 'sovereign states' would lead them to be unmindful of the national interest as expressed in the Constitution, laws and treaties of the United States. The constitutional litigation of the first half of the nineteenth century does not prove these fears to have been ill-founded.

Felix Frankfurter and James M. Landis, *Business of the Supreme Court*, 190-91 (1928). *See also* Note, *supra* at 2002 n.75 (Courts of a compacting state might favor their own state's position over those of other compact members).

By Congressional design, the Columbia River Gorge Commission must have its disputes decided by state courts. 16 U.S.C. § 544m(b)(6).[16] Construction of the Columbia River Gorge Compact thus occurs in the state courts. The issue of potential local bias is very real. However, as this Court has specified, state courts do not have the final word on construction of an interstate compact. *Delaware River Joint Toll Bridge Commission*, 310 U.S. at 427-28; *See also, State ex rel. Dyer*, 341 U.S. at 28. This Court has the ability to protect against such locally biased decisions of the state courts.

Petitioners recognize that this Court cannot be expected to review the merits of all cases involving construction of an interstate compact. *See* Note, *supra*. At 2002. ("[G]iven the limited capacity of the Supreme Court docket, the Court

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[16] In one case, the District Court for the Eastern District of Washington construed the Gorge Commission's obligations under the Compact. *Klickitat County v. Columbia River Gorge Comm'n*, 770 F.Supp. 1419, 1427-29 (E.D. Wash., 1991) (determining that the Gorge Commission need not comply with Washington's State Environmental Policy Act). However, the Secretary of Agriculture was a co-defendant of the Gorge Commission.

would be capable of providing a forum for only a limited number of compact disputes."). This case provides an opportunity for the Court to deflect future interstate compact cases by clarifying that a compact agency is due some level of deference regarding not only its interpretation of the compact that created it,[17] but also the local ordinances that the compact authorizes it to interpret, or by specifying guidelines for interpretation of compacts to avoid the potential local bias problem.

1. *A compact agency should be given deference in interpretation of the compact it is created to implement.*

As a general matter, an agency charged with administering a statute bearing on that agency's responsibilities is entitled to considerable deference. *Chemical Manufacturers Association v. Natural Resources Defense Counsel*, 470 U.S. 116, 125 (1985).

As noted above, the Gorge Commission is a unique entity that wears several hats, including creating the Management Plan, reviewing county land use ordinances and development for consistency with the Management Plan, hearing appeals, and enforcing the Act and Management Plan. Thus, it is already in the position of administering the Act, Compact and Management Plan, and providing uniform interpretations of their requirements. An agency interpretation of statutes it administers is "a substantial factor to be considered in construing the statute." *Miller v. Youakim*, 440 U.S. 125, 144 (1979). This is especially true where, as is the case here, the agency developed the provision it is interpreting. *Id.* Furthermore, where "Congress has specifically assigned to the administrative agency the responsibility of interpreting and administering the statute at issue, this Court has many times made clear that this sort of question of law is for the

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[17] The Washington Court of Appeals gave no deference to the Gorge Commission's interpretation of the compact. 16 P.3d at 705.

agency to decide, so long as its interpretation of the statute is reasonable." *Southwestern Bell Telephone Company v. F.C.C.*, 153 F.3d 523, 535 (8th Cir. 1998).

Here, the Gorge Commission must review the county land use ordinances, which implement the Management Plan in the National Scenic Area, such as Skamania County's in this case, for consistency with the Management Plan. 16 U.S.C. §§ 544e(b)(3) and 544f(i). The Gorge Commission also hears appeals arising from application of county ordinances, 16 U.S.C. § 544m(a)(2). By Congressional design, the Gorge Commission is in the best position to interpret its own intent and ensure uniformity among the county's land use ordinances.

Finally, this Court has recognized "that the weight of an administrative interpretation will depend, among other things, upon its consistency with earlier and later pronouncements of an agency." *Morton v. Ruiz*, 415 U.S. 199, 237 (1974). Here, the Commission previously reached the identical decision in an earlier case construing the Compact as allowing it to provide a regional interpretation of the same "discontinued" term and interpreting that term as requiring only an objective period of non-use.[18] Because the Commission has been

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[18] In *Andersen v. Columbia River Gorge Comm'n*, No. 91-2-000109-1, slip op. (Sup. Ct. Skamania County, May 16, 1994), the plaintiff challenged a decision of the Gorge Commission interpreting an identical provision at issue here. There, the Commission, as here, determined that the right to continue a nonconforming use was lost after one year of non-use, regardless of subjective intent. *Id.* at 2. In a well-reasoned, but unpublished opinion, a panel of the Washington Court of Appeals (different from the panel that issued the decision in the instant case) properly deferred to the Commission's interpretation. *Andersen v. Columbia River Gorge Comm'n*, No. 18370-6-II, slip op. (Wash. App. Dec. 13, 1996). Yet, as noted above, the same Court expressly declined to provide any deference to the Commission decision in the instant case concerning the same standard.

completely consistent in its interpretations of the provision at issue, that interpretation is entitled to deference. *See Morton*, 415 U.S. at 237.

By failing to give deference to the Gorge Commission, the Washington Court of Appeals' decision defeats the scheme established by Congress, conflicts with the precedent of this Court, and will lead to specific disputes about whether each application of state law is consistent with the purposes and standards of the Act, Compact, and Management Plan.

2. *Interpretation of interstate compacts poses similar issues as interpretation of treaties, which United States courts have addressed.*

Another way this Court may deflect future cases raising questions of compact interpretation is to specify how compacts should be interpreted. The Court might may look to international treaty law by analogy to clarify how interstate compacts should be interpreted. In the past, this Court has compared interstate compacts to treaties. *See, e.g., Hinderlider v. La Plata River & Cherry Creek Ditch Co.* 304 U.S. 92, 104 (1937) ("The compact—the legislative means—adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations."); *New Jersey v. New York*, 523 U.S. 767, 831 (1998) (Scalia, J. dissenting, noting that the Court has applied contract principles to treaties and that "the Compact here is of course a treaty").

Interpretation of interstate compacts poses substantially similar problems as does interpretation of multilingual treaties. The problem with multilingual treaties arises when a treaty is adopted and ratified in one language, but then translated to another language. "[T]he natural tendency [is] to use the same word in several languages, although the meaning of the word differs considerably from one language to another." Dinah Shelton, *Reconcilable Differences? The*

Interpretation of Multilingual Treaties, 20 Hastings Int'l & Comp. L. Rev. 611, 620 (1997). Likewise, in an interstate compact, the same term might have different meaning when interpreted according to the states' own laws. This is precisely illustrated in this case. The two states have different meanings of the nonconforming uses standard at issue in this case. *See supra,* text at note 7.

The Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, suggests that treaties be interpreted in light of their purpose. Paragraph 1 of article 31 of the Convention states that:

> [a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and paragraph 4 of article 33 states "[e]xcept where a particular text prevails in accordance with paragraph 1 [of Article 33], when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty,[19] shall be adopted.

Although the United States has not ratified the Vienna Convention, it is a signatory to the Convention, and courts have recognized the Convention as a codification of customary international law and an authoritative guide to current treaty law and practice. *See, e.g., Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 191 (1993) (Blackmun, J. dissenting, applying Article 31 of the

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[19] The language addressing "the object and purpose of the treaty" was included specifically at the behest of the United States. U.N. Confer ence on the Law of Treaties, Proposals and Amendments Submitted to the Committee of the Whole 151, U.N. Docs. A/ CONF.39/C.1/L.197 & L. 209.

Convention). The Convention requires an interpreter of an international treaty to first consider "the terms, context (including related agreements), and purpose of the treaty, and also any subsequent agreement and practice * * *." Peter Germer, *Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties*, Harv. Int'l L.J., 401, 402 (1970).

By analogy, an interstate compact should also be interpreted to give great weight to its object and purpose. In this case, the Washington Court of Appeals did not give *any* consideration to the underlying problem that Congress identified: that the states' laws were not individually protecting the land resources of the Gorge, and that uniformity was necessary to do so. The precise standards at issue in this case are just one illustration of the impossibility of interpreting the Management Plan in accordance with state law, but at the same time ensuring uniformity throughout the Scenic Area.

By clarifying that an interstate compact agency is entitled to deference when interpreting its enabling compact, or that courts should interpret compacts in light of their object and purpose, this Court can fulfill its role in ensuring that the individual states not attempt to control compact agencies unilaterally without need for this Court to resolve each individual dispute concerning interpretation of a compact.

CONCLUSION

Congress established the Columbia River Gorge National Scenic Area for the purpose of protecting its unique and outstanding resources. Uniformity of land management is evident in the provisions of the Act, and the states' actions creating the Commission. Contrary to the Act, this Court's precedent, and the precedent of virtually every other federal and state court, the Washington Court of Appeals has interpreted the Compact to require the Gorge Commission,

the interstate compact agency, to apply Washington's common law instead of uniform law. This defeats the very purpose of the Compact. The Court's decision also limits Congress's ability to devise creative management schemes for areas of national importance.

To protect against local bias, this Court has reserved for itself the last word on interpretation of compacts. This is the second recent case to ask this Court to decide the issue of when a compact agency must follow state law. This is an issue that is vitally important for all compact agencies, because they must know when they may act without the bounds of state law in order to achieve the purpose of their compacts. And, it is important to states which desire to create compacts. This case illustrates the issue clearly and succinctly, along with how this Court may resolve the issue in manner that can deflect similar cases, yet preserve its need be the last word on construction of compacts.

For all these reasons, Petitioners ask this Court to grant this petition.

Respectfully submitted,

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APPENDICES

APPENDIX A

THE SUPREME COURT OF WASHINGTON

[Filed Oct. 4, 2001]

NO. 70980-7

C/A NO. 25204-0-II

SKAMANIA COUNTY,

Respondent,

v.

CHRIS WOODALL and COLUMBIA RIVER GORGE COMMISSION,

Petitioners.

ORDER

Department I of the Court considered this matter at its October 4, 2001, En Banc conference, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 4th day of October, 2001.

/s/ Henry J. Alexander
CHIEF JUSTICE

APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

[Filed Jan. 26, 2001]

No. 25204-0-II

SKAMANIA COUNTY,

Appellant,

v.

WOODALL, CHRIS,

Respondent,

and

COLUMBIA RIVER GORGE COMMISSION,

Intervenor-Respondent.

PUBLISHED OPINION

HOUGHTON, J.—The Skamania County Board of Adjustment ruled that Washington law requires a person seeking to prove a land occupier has discontinued a nonconforming use to prove that the land occupier intended to discontinue that use. On appeal, the Columbia River Gorge Commission ignored Washington law and ruled that the term "discontinued" did not contain an intent element. The superior court affirmed the Commission, and Skamania County appeals. We reverse and remand to the Commission for further proceedings.

FACTS

Background

In 1986, President Reagan signed into law the Columbia River Gorge National Scenic Area Act (the Act), which created the Columbia River Gorge Commission (the

Commission). *See* Columbia River Gorge National Scenic Area Act of 1986, 100 Stat. 4274 (codified at 16 U.S.C. §§ 544-544p). Washington and Oregon made the Act effective by agreeing to the Columbia River Gorge Compact (the Compact), which adopted the Act as state law. RCW 43.97.015; OR. REV. STAT. § 196.150.

Backers of the Act began lobbying Congress in 1980. Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History,* 17 ENVTL.L. 863, 881 (1987). One of the principal issues in the six-year debate was who would control land use regulations, especially in the places eventually designated as "Special Management Areas." Blair, *supra,* at 899. Backers wanted to follow the Cape Cod formula, where the federal government required local land use regulations to be consistent with federal rules. Blair, *supra,* at 952. President Reagan opposed federal control because he argued federal zoning was unconstitutional. Blair, *supra,* at 920.

To resolve this concern, Congress adopted a compromise the backers developed. Although this compromise gave the counties a large role in administering their land use ordinances, and gave the Secretary of Agriculture (the Secretary) a role in overseeing land management, it also gave a large role to a Commission comprised of Oregon and Washington citizens. The compromise provided that the Secretary and the Commission would adopt an overall Management Plan. 16 U.S.C. § 544f(f). The counties would then adopt local land use ordinances, and submit them to the Commission, which would ensure the ordinances were consistent with its Management Plan. 16 U.S.C. § 544f(h)(2), (i)(1). If the Commission did not approve the ordinance, the county could revise it, or the Commission would impose a plan on the county. 16 U.S.C. §544f(i)(2)-(3), (*l*). If the Commission approved the ordinance, the Commission would send it to the Secretary for approval. 16 U.S.C. § 544f(j). If the Secretary

approved the ordinance, the counties would enforce it and the Commission would serve merely as an appellate administrative body. 16 USC § 544m(a)(2). If the Secretary did not approve the ordinance, the Commission could either send the ordinance back to the county for revision, or override the Secretary's veto with a two-thirds vote. 16 U.S.C. § 544f(j)-(*l*). A county could submit a land use ordinance at any time, even after the Commission imposed its plan on that county. 16 U.S.C. § 544f(m). *See generally Columbia River Gorge United-Protecting People & Prop. v. Yeutter*, 960 F.2d 110, 112 (9th Cir.) (giving an overview of this process), *cert. denied*, 506 U.S. 863 (1992). The Act gave state courts jurisdiction over almost all challenges to the Commission's actions. 16 U.S.C. § 544m(b)(6).

The Secretary and the Commission completed the final Management Plan in 1992. Under "EXISTING USES," it provides:

> 1. Except as otherwise provided, any use or structure existing on the effective date of the Management Plan may continue, as long as it is used in the same manner and for the same purpose as on that date.
>
> . . . .
>
> 3. Replacement or reestablishment of a use or structure discontinued for 1 year shall be subject to the policies and guidelines in the Management Plan. . . .
>
> . . . .
>
> 10. Except as otherwise provided, whether a use has a vested right to continue will be determined by the law on vested rights in the appropriate state.

MANAGEMENT PLAN FOR THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA at II-87 to II-98 (1992). The Commission approved Skamania County's land use ordinance on existing uses, which provides:

1. Except to the extent specifically set forth below, any use or structure existing on October 15, 1991[,] may continue so long as it is used in substantially the same manner and for the same purpose as on that date.

2. Replacement or reestablishment of a use or structure discontinued for one year shall be subject to the provisions of this Title.

SKAMANIA COUNTY CODE § 22.06.090.

Procedural Posture Below

In summer 1995, the director of the Skamania County Department of Planning and Community Development approved Scott Anderson's[1] application to run a mobile home park in a Special Management Area of the Columbia River Gorge, finding it had been a mobile home park prior to the new zoning rules and, thus, was a valid nonconforming use. Chris Woodall, the owner of a neighboring mobile home park, appealed and asserted that the prior owners had discontinued using the site for over one year, and thus forfeited the nonconforming use.[2] The Skamania County Board of Adjustment affirmed the director's ruling, agreeing that Washington law required Woodall to prove that the prior owners intended to discontinue using the site as a mobile home park before they could lose their vested right. Woodall appealed to the Columbia River Gorge Commission under 16 U.S.C. § 544m(a)(2), arguing that the Board had applied the wrong legal standard and that the facts did not support the Board's findings.

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[1] Anderson sold the park and the current owners are not a party in this appeal.

[2] The mobile home park initially had 10 sites. It is not disputed that three of these sites were in continuous use at the time of the Board's ruling in 1995.

The Commission reversed the Board of Adjustment, finding that the Board applied the wrong legal standard. Refusing to apply Washington law, the Commission found that "discontinued for one year" meant stop using for one year, irrespective of intent. The Commission reasoned that the purpose of the one-year period was to provide an objective test rather than a subjective test like intent. The Commission further found that this interpretation was consistent with its purposes of protecting the Gorge and providing uniform enforcement. Although the Commission did not directly address the Washington authority that was contrary to its interpretation, it asserted that because an interstate compact created it, its interpretation of the law preempted state law.

Having determined that intent was irrelevant, the Commission did not address Woodall's second claim that the facts did not support the Board's conclusion that the land occupiers had not intended to abandon the seven sites at issue.[3]

Skamania County appealed to the superior court. The Commission intervened and argued to affirm. The superior court affirmed the Commission's ruling. Skamania County appeals.

There are two questions on appeal: Was the Commission required to apply federal law or Washington law to resolve issues not resolved by the Act or Management Plan? If the Commission was required to apply Washington law, did it do so properly?

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[3] The Commission recognized that Woodall was also challenging whether there was substantial evidence to support the Board's conclusions, but did not address that challenge because it found the legal issue "paramount." Clerk's Papers at 8. This evidence is contained in the record the Commission transmitted to the superior court.

ANALYSIS

I.

The first question has two parts. (A) Whose law must we apply when determining whether the Commission was required to apply federal or Washington law? and (B) Under that law, whose law was the Commission required to apply?

A.

For an interstate compact to be formed under the interstate compact clause of the federal constitution, Congress must consent and the compacting states must consent.[4] Here, the Act evidences Congress's approval and the Compact evidences Washington and Oregon's approval. Thus the Act and the Compact govern the operation of the Commission, including questions of whose law the Commission is required to apply when deciding a land use dispute between parties such as those here.

When construing the Act and Compact, we are governed by federal law. *See Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278, 79 S. Ct. 785, 3 L. Ed. 2d 804 (1959); *see also Cuyler v. Adams*, 449 U.S. 433, 438-40, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981). To ascertain the meaning of a statute, courts look to the intent of Congress. *Negonsett v. Samuels*, 507 U.S. 99, 104, 113 S. Ct. 1119, 122 L. Ed. 2d 457 (1993). To determine this intent, courts first look at the plain meaning of the statute. *Negonsett*, 507 U.S. at 104. Courts must read each clause in context, considering the meaning of the statute as a whole. *Holloway v. United States*, 525 U.S. 1, 6-7, 119 S. Ct. 966, 143 L. Ed. 2d 1 (1999). Courts then employ ordinary tools of statutory

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[4] *See* U.S. CONST. art. I, § 10, cl. 3("No State shall, without the consent of the congress, . . . enter into any agreement or compact with another state[.]"). Because a compact requires congressional consent, Congress's intent controls over state intent. *See Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278 & n.4, 79 S. Ct. 785, 3 L. Ed. 2d 804 (1959).

construction, *see Regions Hosp. v. Shalala*, 522 U.S. 448, 457, 118 S. Ct. 909, 139 L. Ed. 2d 895 (1998), such as considering legislative history. *Blum v. Stenson*, 465 U.S. 886, 896, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984).

Courts should not look to an agency's interpretation of a statute unless the intent of Congress is unclear. *Norfolk and Western Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 128, 111 S. Ct. 1156, 113 L. Ed. 2d 95 (1991). Courts should disregard an agency interpretation of a statute if it is inconsistent with the intent of Congress. *FDA v. Brown & Williamson Tobacco Corp*, 529 U.S. 120, 120 S. Ct. 1291, 1297, 146 L. Ed. 2d 121 (2000). Finally, courts should not defer to an agency interpretation of an ambiguous statute if the interpretation is not within the agency's area of expertise. *National Ass'n of Gov't Employees, Inc. v. Fed. Labor Relations Auth.*, 179 F.3d 946, 950 (D.C. Cir. 1999); *see also Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 97, 115 S. Ct. 537, 130 L. Ed. 2d 439 (1994).

B.

Having determined that we must construe the Act and Compact using federal law, we must now determine whether the Act and Compact, when construed according to federal law, require the Commission to apply federal law or Washington law when deciding a zoning matter of this type.[5] For several reasons, we think the Commission should apply Washington law because the Act and Management Plan did not resolve the dispute.

First, Congress's decision not to make the Commission a federal agency suggests it wanted the Commission to apply state law. Had Congress wanted the Commission to apply federal law, it could have made the Commission a federal agency. But instead the Act provides, "The Commission . . .

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[5] The only other possibility is Oregon law, and neither party argues it should apply.

shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law[.]" 16 U.S.C. § 544c(a)(1)(A).[6]

Second, Congress's decision to give state courts almost exclusive jurisdiction over appeals from Commission action suggests Congress intended the Commission to apply state law. Had Congress wanted the Commission to apply federal law, it would have placed appeals from the Commission primarily in the federal courts. But instead it placed appeals almost exclusively in the state courts.[7] *See* 16 U.S.C. § 544m(b)(6). Federal courts do not even have concurrent jurisdiction over the issues the Act provides are to be decided in state courts. *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616, 621 (9th Cir.), *cert. denied*, 510 U.S. 813 (1993).

Third, the legislative history suggests Congress did not want the Commission applying federal law to a zoning case like this. The backers of the Act made specific changes to address President Reagan's concerns that the Act would amount to federal zoning laws. *See* Blair, *supra*, at 920. A substantial amount of the Commission's work is zoning. If courts were to review Commission actions under federal law, this would raise the specter of federal zoning. Moreover, "[t]here is . . . no federal law of zoning,"[8] so it is unclear what courts would apply.

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[6] *Cf. Lakeview Dev. Corp. v. City of S. Lake Tahoe*, 915 F.2d 1290, 1295 (9th Cir. 1990) (reviewing the Tahoe Regional Compact and holding that although the compact was incorporated into federal law, "it did not make applicable the entire panoply of federal administrative and substantive standards.") (internal quotation omitted), *cert. denied*, 501 U.S. 1251 (1991).

[7] The only exceptions are criminal prosecutions and lawsuits that involve the Secretary of Agriculture. 16 U.S.C. § 544m(b)(5).

[8] *League to Save Lake Tahoe v. Crystal Enters.*, 685 F.2d 1142, 1144 (9th Cir. 1982).

Fourth, Congress's approval of the Compact suggests it wanted the Commission to apply state law. Congress approved the Compact, knowing it expressly provided that "the provisions of [the Columbia River Gorge Compact] hereby are declared to be the law of this state." RCW 43.97.015.

Fifth, Congress's decision not to dictate that federal law apply suggests it intended the Commission to apply state law. When Congress placed jurisdiction almost exclusively in the state courts, it did not command the state courts to apply federal law. Congress had to know that absent such a command, Washington state courts are required to apply Washington state common law. *See* RCW 4.04.010 ("The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."); *see also Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994) ("[A] statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it.").

Moreover, a state may reserve the right to have its laws apply to an interstate compact commission. *See Seattle Master Builders Assn. v. Pac. N.W. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1371 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987). As noted, by statute and judicial decision, all Washington statutes are interpreted by Washington courts under Washington common law unless the Legislature expresses otherwise. *See* RCW 4.04.010;[9] *Price*, 125 Wn.2d at 462. Nothing in the Compact or the Act can be interpreted as a clearly expressed intention

[9] Although RCW 4.04.010 was not included in the Compact itself, it is a statute that applies to all Washington legislation and thus it became part of the Compact, RCW 43.97.015.

of the Legislature to give the Commission the authority to ignore Washington common law when interpreting a Washington State county ordinance. Further, the Act reserves a prominent role for county ordinances, for county officials interpreting those ordinances, and for state courts. By expressly reserving this role for the counties and state courts, the Act preserves some degree of local control and uses local and state expertise—expertise that will be in state common law, not federal law or some undefined "Commission law."[10] Thus, RCW 4.04.010 and the Act's prominent role for state courts and county officials serve the requirement of *Seattle Master Builders* that the Legislature reserves the state's right to have its common law applied to the Commission.[11]

Sixth, the Management plan suggests the Commission thought Congress had at least allowed it to apply state common law in cases involving vested rights. Section 10 of the Existing Uses portion of the Commission's Management Plan provides that state law applies when dealing with issues of vested rights:

> Except as otherwise provided, whether a use has a vested right to continue will be determined by the law on vested rights in the appropriate state.

MANAGEMENT PLAN, *supra*, § 10 at II-89. If the Act required the Commission to follow federal common law instead of

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[10] It is also worth noting the Commission bases much of its argument upon Washington law.

[11] Our decision in *Tucker v. Columbia River Gorge Comm'n*, 73 Wn. App. 74, 77-79, 867 P.2d 686 (1994), where we held that state zoning standards of review applied to a review of Commission actions, is consistent with this conclusion. The superior court relied heavily upon an unpublished decision, *Andersen v. Columbia River Gorge Comm'n*, No. 18370-6-II (Wash.App. Dec. 13, 1996). Unpublished opinions have no precedential value and should not be cited or relied upon in any manner. *See* RAP 10.4(h).

state common law, then the Commission could not have dictated that state law applied when dealing with vested rights.

The Commission argues that section 10 does not apply because it is referring to the vested rights doctrine. We disagree. In Washington, "[t]he right to continue a nonconforming use despite a zoning ordinance which prohibits such a use in the area is sometimes referred to as a 'protected' or 'vested' right." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998). A zoning ordinance may provide for the phase out of nonconforming uses, but may not require a property owner immediately to cease a nonconforming use. *Rhod-A-Zalea*, 136 Wn.2d at 7.

In addition to this broad definition of vested rights, Washington also recognizes the "vested rights doctrine." *Rhod-A-Zalea*, 136 Wn.2d at 16. Under this doctrine, a person who has completed a building permit application has a vested right to have that application processed according to the laws in effect upon submission of the application. *Rhod-A-Zalea*, 136 Wn.2d at 16. This doctrine only provides a right to have the application processed under existing rules; it does not provide a right to have any particular law or regulation apply to the location or use after the application is approved. *Rhod-A-Zalea*, 136 Wn.2d at 15-16.

Based upon the plain meaning of section 10 of the Management Plan, that section discusses the general phrase "vested rights," not the vested rights doctrine. First, this is apparent because the section provides that "*a use* has a vested right *to continue*." MANAGEMENT PLAN, *supra*, at II-89 (emphasis added). The vested rights doctrine does not concern a use because "the doctrine applies only to permit applications." *Rhod-A-Zalea*, 136 Wn.2d at 16. Once a use is established (and thus able to continue), "this doctrine has no bearing." *Rhod-A-Zalea*, 136 Wn.2d at 16. If we were to accept the Commission's interpretation of this clause, we

would have to find that the term "use" refers to an application, not an actual use. Second, it is apparent because of section 10's placement in the Management Plan. It appears in a part entitled "EXISTING USES." MANAGEMENT PLAN, *supra*, at II-87 to 89. Sections 1-9 all deal with nonconforming uses. Thus, logically section 10 must also deal with nonconforming uses, meaning that the phrase "vested rights" includes nonconforming uses. Finally, it is apparent because the term "use" is used throughout this part of the Management Plan to refer to existing uses, not just a right to have an application processed under particular rules. *See* MANAGEMENT PLAN, *supra*, at II-87 to 89. Thus, the term "use" in section 10 should be given the same meaning.

The Commission quotes *Noble Manor Co v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997), and argues that case holds that vested rights in Washington only involve the vested rights doctrine. In that case, the Supreme Court stated:

> The resolution of this case turns on the meaning of RCW 58.17.033, the statute codifying the "vested rights doctrine" as it applies to subdivisions and short subdivisions. In Washington, *"vesting" refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission.*

Noble Manor Co., 133 Wn.2d at 275 (emphasis added). The Commission, by only quoting the italicized portion of this quotation, finds support for its argument. But when the quotation is read as a whole, it is clear that the term "vesting" in the second sentence is referring back to the phrase "vested rights doctrine" used in the first; it is not limiting the meaning

of "vesting" in every case.[12] And, of course, our Supreme Court referred to nonconforming uses as vested rights. *See Rhod-A-Zalea*, 136 Wn.2d at 6.

Accordingly, section 10 dictates that the Commission should have used state law to determine the meaning of "discontinued" in section 3. "Administrative agencies are bound by their own rules." *Deffenbaugh v. DSHS*, 53 Wn. App. 868, 871, 770 P.2d 1084 (1989).[13] Section 10 instructs the Commission to use state law to determine the scope of vested rights. "Nonconforming uses are vested property rights," so section 3 deals with a vested right. *See Van Sant v. City of Everett*, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993). It provides that the right to nonconforming uses terminates if the use is discontinued for more than one year. The

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[12] The Commission's quotation from *Westside Bus. Park, L.L.C. v. Pierce County*, 100 Wn. App. 599, 608, 5 P.3d 713, *review denied*, 141 Wn.2d 1023 (2000), must also be read in context. There, we stated:

> The County contends that *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998), requires the finding that the vested rights doctrine does not apply to regulations that do not affect use. But *Rhod-A-Zalea* is not a vested rights case; it involved a nonconforming use. The Court found that Rhod-A-Zalea's valid nonconforming use nonetheless did not exempt it from reasonably enacted police power regulations for the health, safety and welfare of the community.

Westside, 100 Wn. App. at 608. The Commission bolds the second sentence and asserts that nonconforming uses are not vested rights. But read in context, the term "vested rights" in the second sentence is referring to the vested rights doctrine in the first sentence. We agree that nonconforming uses are not part of the vested rights doctrine; rather, they are vested rights. Thus, *Westside* does not support the Commission's argument.

[13] *See also Panhandle E. Pipe Line Co. v. Fed. Energy Regulatory Comm'n*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) (it is "axiomatic that an agency is bound by its own regulations"), *cert. denied*, 449 U.S. 889 (1980).

Management Plan does not define the word "discontinued." Therefore, under section 10, the Commission should have looked to state law to define "discontinued."

The Commission makes two additional arguments, but neither has merit. First, the Commission argues that section 3 and section 10 continue policies from the Interim Guidelines, where it was clear that the phrase "vested rights" referred to the vested rights doctrine. This argument is flawed because the meaning of section 10 is unambiguous, so there is no need to resort to the Interim Guidelines to help interpret it.

Second, the Commission argues that section 3 satisfies the first clause in section 10—"Except as otherwise provided"—and, thus, instead of looking to state law for this question, the court should look to section 3. This argument is circular because we are trying to determine the meaning of "discontinued" in section 3. Section 3 is ambiguous so the court cannot look to section 3 for section 3's meaning. Nowhere in the Management Plan is "discontinued" defined and nowhere does the Management Plan instruct that some other law besides state law governs questions of vested rights not decided in sections 1-9.

For these reasons and based upon federal law, we conclude Congress intended the Commission to apply Washington common law to resolve zoning disputes, such as the one before this court, when the Act or Management Plan does not provide a solution. The Commission's ruling to the contrary does not warrant deference because it is in conflict with the intent of Congress, and because choice of law questions are not within the Commission's area of expertise. *See Brown & Williamson*, 120 S. Ct. at 1297; *Nat'l Ass'n of Gov't Employees*, 179 F.3d at 950. The Commission erred when it decided to ignore Washington law when defining the term "discontinued."

II.

Next we must decide what a party must do to prove a land occupier has discontinued using a nonconforming use under Washington law. The land occupier has the initial burden of proving the existence of a nonconforming use. *Van Sant* 69 Wn. App. at 647-48. Once the land occupier establishes this nonconforming use, the burden shifts to the person claiming that the right has been extinguished to prove that this has in fact occurred. *Van Sant* 69 Wn. App. at 648.

Here, the Skamania County ordinance provides that a land occupier loses the right to continue a nonconforming use if the use was "discontinued for one year." SKAMANIA COUNTY CODE 22.06.090. Under Washington law, to prove a land occupier has discontinued using a nonconforming use, a person seeking to prove discontinuance has the burden of proving:

> (a) An intention to abandon; and (b) an overt act, or failure to act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use.

Van Sant 69 Wn. App. at 647-48 (quoting 8A E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.192 (3d Ed.1986)); *see also King County v. High*, 36 Wn.2d 580, 582-83, 219 P.2d 118 (1950). If the ordinance references a time frame—such as discontinued for one year—then once the person seeking to prove discontinuance proves the land occupier has not used the property for that time period, a rebuttable presumption arises that the land occupier has intended to abandon the nonconforming use. *City of Univ. Place v. McGuire*, 102 Wn. App. 658, 671, 9 P.3d 918 (2000); *see also High*, 36 Wn.2d at 582.

Here, the Commission did not address whether the evidence before the Board supported its finding that the land occupiers did not intend to abandon the seven sites in the

mobile home park. Therefore, we must remand to the Commission to decide this issue, based solely upon the evidence that was previously submitted to the Board. *See supra* note 3.

Reversed and remanded for further proceedings consistent with this opinion.

/s/ Houghton, J.
Houghton, J.

We concur:

/s/ Morgan, J.
Morgan, P.J.

/s/ Wang, J.P.T.
Wang, J.P.T.

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SKAMANIA

[Filed Sep. 12, 1999]

No. 97-2-00016-7

SKAMANIA COUNTY,
Petitioner,

v.

CHRIS WOODALL, *et al.*,
Respondent,

and

COLUMBIA RIVER GORGE COMMISSION,
Intervenor-Respondent.

ORDER AND JUDGMENT UPHOLDING COLUMBIA RIVER GORGE COMMISSION AND CHRIS WOODALL

This matter having come on for argument before the Honorable Roger Bennett in Skamania County Superior Court pursuant to Skamania County's motion for summary judgment; Gary Kahn appearing on behalf of respondent Chris Woodall; Bradley Andersen appearing on behalf of petitioner Skamania County; and Lawrence Watters appearing on behalf of Intervenor-Respondent Columbia River Gorge Commission; the Court having considered the argument of the parties and the record now, therefore

IT IS HEREBY ORDERED AND ADJUDGED that the Columbia River Gorge Commission's motion to intervene on the side of the Respondent, Chris Woodall, is granted.

IT IS FURTHER ORDERED AND ADJUDGED that the decision of the Columbia River Gorge Commission, from which Skamania County brought this appeal, is upheld and summary judgment is hereby granted in favor of Chris Woodall and the Columbia River Gorge Commission.

IT IS FURTHER ORDERED AND ADJUDGED that the Court's RULING ON PETITIONER'S MOTION OR SUMMARY JUDGMENT dated June 11, 1999 is hereby attached and incorporated by this reference; and, in accord with Rule 56(h), this ORDER AND JUDGMENT is based on the briefs of the parties and the administrative record of the proceedings below.

DATED this 21st day of September, 1999.

/s/ Roger A. Bennett

Presented by:

/s/ Lawrence Watters
LAWRENCE WATTERS, WSBA No. 7454
Counsel
Intervenor-Respondent Columbia River Gorge Commission

/s/ Gary Kahn
GARY KAHN, WSBA No. 17928
Respondent Chris Woodall

/s/ Bradley Andersen
BRADLEY ANDERSEN, WSBA No. 20640
Prosecuting Attorney
Skamania County

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF CLARK

NO. 97-2-00016-7

SKAMANIA COUNTY,

Petitioner,

vs.

CHRIS WOODALL,

Respondent.

RULING ON PETITIONER'S MOTION FOR SUMMARY JUDGMENT

This matter comes before me on Skamania County's motion for summary judgment. The case arises out of a ruling by the Columbia River Gorge Commission, (CRGC) which overturned a decision of the Skamania County Board of Adjustment. At issue before the CRGC was the question of whether or not the owners had discontinued a non-conforming uses of land within the Columbia River Gorge National Scenic Area. The present owner's predecessors had operated a 10 site RV park in the scenic area prior to the enactment of the *Columbia River Gorge National Scenic Area Act*, 16 U.S.C. § 544, et seq., which would prohibit such use; however, as a pre-existing use, the RV park could be permitted. If, however, use as an RV park was discontinued, within the meaning of applicable law, further use would not be lawful.

Pursuant to Skamania County code, S.C.C. 22.06.909 A2, a pre-existing, non-conforming use of property within the scenic area, if discontinued for over a year, for purposes of this case, cannot be re-established. Therefore, the pivotal question is whether or not use as an RV park had been

discontinued. The code does not define the term, whereas Washington land use law, as argued by Skamania County, requires that discontinuation be accompanied by an intent to abandon the non-conforming use.

The Skamania County Board of Adjustment, in affirming an earlier decision of the Skamania County Department of Planning and Community Development, determined that a use is not discontinued unless it is proven that the owner subjectively intended to abandon the use. This is the position taken by Skamania County at this time. Chris Woodall, and Intervenor CRGC take the position that such subjective intent need not be proven; that non-use alone constitutes discontinuance.

Woodall and CRGC further argue that if Skamania County is correct in its position that proof of intent is required, the record in this case does not support the conclusion reached by the Board of Adjustment, that intent to abandon had not been proven. This issue was presented to the CRGC, but not decided by that body. The motion for summary judgment before this court, brought by Skamania County, does not present this issue, and therefore, is not before the court at this state of the proceedings.

The essential question presented here today is whether the Skamania County Board of Adjustment is to apply general principles of state land use law, which seems to require proof of intent to abandon, in order to establish discontinuance of a use, or, conversely, whether the Board must apply a "scenic area law" pronounced by the CRGC itself. The resolution of this debate implicates complex issues of preemption and policy.

The Columbia River Gorge Scenic Act requires counties to enact land use ordinances consistent with CRGC's comprehensive management acts, and the purposes of the Act.

In this matter, Skamania County's ordinance is drafted in language similar to the comprehensive management plan previously adopted by the CRGC. The ordinance was enacted on December 21, 1993. Prior to the drafting of such ordinance, in 1991, the CRGC had, in a case later filed in Skamania County Superior Court, under the title *Stanley W. Andersen v. CRGC*, Skamania County Cause #91-2-00109-1, ruled that discontinuance of a use can be established without proof of intent to abandon.

This ruling of the CRGC was later affirmed by the Skamania County Superior Court and Division II of the Washington Court of Appeals, by unpublished opinion. The Superior Court's decision and the Court of Appeals opinion have no *stare decisis* effect on this court, however, the Andersen case is important for this reason:

As a rule of statutory interpretation, a legislative body is presumed to be aware of prior judicial or administrative interpretations of its legislative enactments, and when a legislative body re-enacts a statute or ordinance in the same language as before such interpretations, it is presumed that it intended the new enactment be interpreted in the same manner as was the prior enactment. When Skamania County enacted its ordinance, dealing with the management of the CRGC Scenic Area, it was aware that the Columbia River Gorge Commission would enforce the ordinance, and that the Gorge Commission had previously interpreted the discontinuance provision of the management plan as not requiring proof of intent to abandon a use. Preemptively, then, in spite of pre-existing Washington law to the contrary, Skamania County is presumed to have intended that its ordinance be applied in accordance with the Gorge Commission's prior interpretation. For this reason, I grant summary judgment to Chris Woodall and Intervenor CRGC.

As an alternative basis for relief, I further grant summary judgment for Chris Woodall and CRGC for the following

reasons, adopted from the *Anderson* case. Although the case has no precedential value, I find its logic persuasive.

The Columbia River Scenic Area includes property in the States of Washington and Oregon. Those two states entered into an interstate compact to create the Scenic Area after obtaining congressional approval as required by the Compact Clause of the United States Constitution. U.S. Const. Art. I, § 10, cl. 3. See 16 U.S.C. § 544 *et seq*; *Columbia River Gorge United-Protecting People and Property v. Yeutter*, 960 .2d [sic] 110, 114 (9th Cir.) *cert. denied sub. non. Columbia River Gorge United-Protecting People and Property v. Madigan*, 506 U.S. 863 (1992).

Congress gave its consent to this interstate compact by Act of Congress in 1986. 16 U.S.C. § 544 *et seq*.

The purposes of the Act are:

> (1) to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational, and national [sic] resources of the Columbia River Gorge; and
>
> (2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with paragraph (1). 16 U.S.C. § 544a.

The consent, however, was expressly contingent upon the creation of a Commission with the powers and responsibilities set forth in the Act. 16 U.S.C. § 544o(d). Oregon and Washington ratified the compact in 1987. Or.Rev.Stat. § 196.150(1987); RCW 43.97.020 [sic].

The Commission is comprised of members appointed by the counties within the Scenic Area, members appointed by the governors of Oregon and Washington, and a nonvoting member appointed by the U.S. Secretary of Agriculture. 16

U.S.C. § 544c. The Commission is responsible for drafting a management plan to regulate all land use within the Scenic Area. 16 U.S.C. § 544d; *Columbia River Gorge United*, 960 F.2d at 112. The Scenic Area counties must then adopt land use ordinances consistent with the standards and purposes of the Act. 16U.S.C. § 544h(c).

The correct construction of an interstate agreement approved by Congress under the Compact Clause presents a federal question. *Cuyler v. Adams*, 449 U.S. 433, 440, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981). A state can impose its own laws on a compact organization only if the compact specifically reserves its right to do so. *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Counsel*, 786 F.2d 1359, 1371 (9th Cir. 1986) (Washington failed to reserve right to apply state environmental laws under act creating the Pacific Northwest Electrical Power and Conservation Planning Council), *cert. denied*, 479 U.S. 1059 (1987); *but see Tucker v. Columbia River Gorge Comm'n*, 73 Wn.App. 74, 78, 867 P.2d 686 (1994) (Commission acts under authority of state law). As Congress expressly conditioned its approval of the agreement at issue hereon the Commission having all those powers and responsibilities identified under the Act, 16 U.S.C. § 544o(d), Washington has not control over the Commission through the application of its own laws. *See Klickitat County v. Columbia River Gorge Comm'n*, 770 F.Supp. 1419, 1429 (E.D. Wash. 1991) (SEPA does not apply to the Commission); *Salmon for All v. Department of Fisheries*, 118 Wn.2d 270, 278, 821 P.2d 1211 (1992) (Commission not subject to state open meeting laws).

Judicial review of an agency's construction of a statute that it administers has two steps. *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). First, if the intent of Congress is clear, the court and the agency must give effect to

the unambiguous intent of Congress. *Chevron*, 467 U.S. at 843-44. But if the court determines that Congress has not addressed the precise question, then it examines the agency's construction of the statute. *Chevron*, 467 U.S. at 844.

The court must accord the agency's construction significant weight. *Chevron*, 467 U.S. at 845. The agency's interpretation does not need to be the only permissible construction; it only needs to be sufficiently rational to preclude the court from substituting its own judgment for that of the agency. *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125, 105 S.Ct. 1102, 84 L.Ed.2d 90 (1985).

Congress found the Scenic Area "to be one of critical national significance." *Columbia River Gorge United*, 960 F.2d at 113. It also specifically required local land use ordinances and the interim regulations to be in accordance with the purposes of the Act. 16 U.S.C. § 544e(b) and 544d(d)(7). The Act encourages the concentration of commercial development within existing urban areas. 16 U.S.C. § 544a. Thus, the Commission's narrow interpretation of "discontinued use" is consistent with Congress's expressed interest in limiting development outside urban areas.

There are various definitions of the term "discontinued use." Under Washington land use law, the mere temporary cessation of a nonconforming use does not effect an abandonment or discontinuance of that use. *Andrew v. King County*, 21 Wn.App. 566, 571, 586 P.2d 509 (1978), *review denied*, 91 Wn.2d 1023 (1979). To find abandonment, there must be evidence of an intent to abandon. *King County v. High*, 36 Wn.2d 580, 582, 219 P.2d 118 (1950); *Andrew*, 21 Wn.App. at 572. Furthermore, there must be an overt act, or failure to act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use. *Andrew*, 21 Wn.App. at 572; *Van Sant v.*

City of Everett, 69 Wn.App. 641, 648, 849 P.2d 1276 (1993) (quoting 8A Eugene McQuillin, Municipal Corporations § 25.192 (3d ed. 1986)).

The law of Oregon and of several other states differs. Those states do not require a showing of intent to abandon to prove the discontinuation of a nonconforming use. *See Bither v. Baker Rock Crushing Co.*, 438 P.2d 988, modified, 440 P.2d 368 (Or. 1968); *Polk County v. Martin*, 636 P.2d 952, 960 (Or. 1981); *Hartley v. City of Colorado Springs*, 764 P.2d 1216, 1227 (Colo. 1988); *Texas Nat'l Theatres, Inc. v. City of Albuquerque*, 639 P.2d 569, 574 (N.M. 1982); *League to Save Lake Tahoe v. Crystal Enters.*, 685 F.2d 1142, 1144 (9th Cir. 1982) (Nevada law). The Commission is not alone in defining "discontinued use" as it did. Its definition is not unreasonable.

DATED this 11th day or June, 1999

/s/ Roger A. Bennett
JUDGE ROGER A. BENNETT

APPENDIX D

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

CRGC File No.: COA-S-96-1
Skamania Co. No.:
NSA 95-32

CHRIS WOODALL,

Petitioner,

v.

SKAMANIA COUNTY,

Respondent,

and

RICHARD BASSETT AND DAVID PEYTON,

Intervenor-Respondents.

DECISION

This case is an appeal by Chris Woodall from a decision of Skamania County upholding the planning director's approval of a mobile home park area in the Columbia River Gorge National Scenic Area. We reverse and remand.

The applicant, Scott Anderson, applied to the County on April 4, 1995 for review of the replacement of ten mobile homes or recreational vehicles. The property, located in a special management area, was subsequently sold to Richard Bassett and David Peyton.[1] The planning director approved the request and Chris Woodall, a neighbor, appealed the decision to the Board of Adjustment. The Board conducted a

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[1] They are intervenors in this appeal.

hearing and upheld the director's approval of the mobile home park. Woodall then filed this appeal with the Gorge Commission.

We address the standard of review first.[2] Since the issues presented are primarily legal in nature, our review focuses on whether the decision violates a provision of applicable law and is prohibited as a matter of law, based on the record before us.

The ten-site mobile home area was established in 1969. Since that time, changes have occurred on the property, the nature and extent of which are disputed by the parties. Woodall takes the position that seven of the ten sites have lapsed because they were discontinued and only three are pre-existing under the ordinance. He points to evidence tending to show hookups from seven sites were dismantled as early as 1989 while only three sites were actually maintained. He also emphasizes a real estate listing agreement in 1995 that only referred to three sites on the property.

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[2] The Commission shall reverse or remand a land use decision when:

(a) The governing body exceeded its jurisdiction;

(b) The decision is unconstitutional;

(c) The decision violates a provision of applicable law and is prohibited as a matter of law; or

(d) The decision was clearly erroneous or arbitrary and capricious.

(e) The findings are insufficient to support the decision;

(f) The decision is not supported by substantial evidence in the whole record;

(g) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s);

(h) The decision improperly construes the applicable law; or

(i) A remand is required pursuant to 360-60-090(2)(d).

Rule 350-60-220.

Woodall contends the governing body treated the entire ten sites as a pre-existing use and, therefore, did not conduct any analysis to determine whether mobile homes are permitted within the land use designation.[3] Simply determining if the placement of each mobile home was consistent with protecting resources (scenic, natural, cultural and recreational) failed to consider whether a mobile home park is an allowed use and therefore, the governing body violated the ordinance and the National Scenic Area Act. Woodall thus argues the governing body's decision is not supported by substantial evidence and that it is based on an error of law.

In response, the governing body and intervenor rely on contrary evidence. A 1974 inventory listed the area as a ten-site mobile home park. Use of at least a portion of the park has remained constant since 1974. Occupancy has fluctuated over the past twenty years but the evidence does not show the site has ever "held more than 10, or less than 1, mobile home". Each of the ten sites has water and electrical service.

The governing body and intervenor contend the property is a ten-site mobile home or recreational vehicle park and, as a pre-existing use, was never discontinued. They also assert that in order to establish discontinuance of a use as a legal proposition, the burden is on Woodall to show the property owner intended to abandon the sites—a burden that was not met.

While the parties disagree over whether there is substantial evidence to support the decision below, a question of law is paramount here: is the test for review of the use in this case one of "discontinuance" or "abandonment".

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[3] The land use designation for the property is Special Management Area - Forest.

In a nutshell, Woodall relies on the language of the ordinance which uses the term "discontinue" as the standard to trigger review in determining if the use is allowed. On the other hand, the governing body construes "discontinue" to mean "abandonment", including proof the property owner actually *intended* to abandon the use.

We begin our analysis by examining the text of the ordinance. Section 22.06.090A.1 provides any use or structure existing on October 15, 1991 may continue as long as it is used in the same manner and for the same purpose as on that date.[4] Section 22.06.090A.2 states if a use is

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[4] The complete text of the relevant portion of the ordinance provides as follows:

A. EXISTING USES IN GENERAL MANAGEMENT AREAS

1. Except to the extent specifically set forth below, any use or structure existing on October 15, 1991 may continue so long as it is used in substantially the same manner and for the same purpose as on that date.

2. Replacement or reestablishment of a use or structure discontinued for one year shall be subject to the provisions of this Title.

3. Any uses or structure damaged or destroyed by fire shall be treated as an existing use or structure if an application for replacement in kind and in substantially the same location is filed within one year. Such uses shall be subject to compliance with the provisions of Chapter 22.10 of this Title protecting scenic resources and involving color, reflectivity and landscaping. Replacement of an existing use or structure different in purpose, size or scope shall be subject to the provisions of this Title to minimize adverse effects on scenic, cultural, natural and recreation resources.

4. An existing use or structure may be replaced within one year of discontinuation of the use or structure if the replacement use or structure will be used for the same purpose at the same location,

discontinued for one year, it shall be subject to the provisions of the ordinance. The result is that where a use is discontinued, a determination must take place as to whether any subsequent resumption is an allowed use under the terms of the ordinance.

The meaning of the term "discontinue" or "discontinuance" is the principal legal issue presented in the appeal. In our review of this term, we apply basic rules of construction to the provisions of the ordinance. The words are used in accord with their plain meaning. *Cowiche Canyon Conservacy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992). They are construed in a manner that best advances their purpose. *Allison v. Housing Authority*, 118 Wn.2d 79, 821 P.2d 34 (1991). They are applied so that meaning is given to each part of the ordinance. *Clark v. Pacificorp*, 118 Wn.2d 167, 822 P.2d 162 (1991).

In general, the word "discontinue" means "to put an end to" or "to cease trying to continue."[5] By coupling this provision with a specific period of one year in the ordinance, an objective standard exists by which to measure the actions of the property owner in question. In contrast, the term "abandonment" means "to withdraw one's support", "to give up by leaving or ceasing to operate or inhabit" or, "to surrender one's claim or right to".[6] This turns more on subjective factors, like intent or state of mind, that are difficult to measure such that the potential for an arbitrary or

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subject to applicable provisions of this Title protecting scenic, cultural, natural and recreation resources.

Skamania County Land Use Ordinance, Section 22.06.090A.

[5] *Webster's II, New Riverside University Dictionary*, 384, The Riverside Publishing Company (1984).

[6] Id. at 65.

improvident result is high.[7] The term itself offers little guidance.

Beyond the plain language of the ordinance, we also consider its purpose. The purpose is manifest in the pertinent section, which read in its entirety, merely requires *review for consistency* with the standards of the ordinance.

This purpose makes clear its function is not, first and foremost, to terminate a prior use but rather, to ensure it is evaluated in light of the standards of the ordinance that apply under the land use designation for the property. Without the review and evaluation process, it is not possible to determine the status of the use and the extent to which it is consistent with the requirements in the ordinance.

In addition, our scrutiny encompasses the origin of the term "discontinuance". The management plan uses it and this was a conscious choice. Plan, II-88. The management plan was designed to provide a clear framework for the application of the standards in the ordinance and, in providing certainty and uniformity, ensure the purposes of the National Scenic Area Act are advanced. 16 U.S.C. § 544c(b) ("Applicable law. For the purposes of providing a uniform system of laws, which, in addition to this Act, are applicable to the Commission . . ."); *Columbia Gorge United v. Yeutter*, 960 F.2d 110, 112 (9th Cir.), *cert denied*, 113 S.Ct. 184 (1992). ("Under the Act, and the resulting Compact, all land use within the Columbia River Gorge Scenic Area, whether private, federal or local, will be consistent with the management plan developed by the Commission.")

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[7] Intent is, by definition, subjective. The term "intent" is defined as "that which is intended" or "*the state of mind* operative at the time of an action." *Webster's II, New Riverside University Dictionary*, 635, The Riverside Publishing Company (1984). (emphasis supplied)

The term was also used in the interim guidelines which preceded the management plan. The guidelines provided that "a use or development discontinued for more than one year" required review for consistency with the purposes and standards of the National Scenic Area Act. IIIA, Interim Guidelines, United States Department of Agriculture Forest Service (1987). The guidelines were promulgated by the Forest Service pursuant to the mandate of the Act and reflect the importance of the national interest in the National Scenic Area. 16 U.S.C. § 544h(a). *See Tucker v. Columbia River Gorge Commission*, 73 Wn. App. 74, 867 P.2d 686 (1994); *Columbia River Gorge United v. Yeutter*, *supra*. ("Moreover, and perhaps most important, the area itself is unique in that it consists of portions of two states bisected by a navigable waterway. In such an area, virtually all activities affecting the land, the economy, the environment, or the resources have interstate ramifications.")

Even without the federal origins of the "discontinuance" standard, our decision in this case is firmly grounded on the plain wording and the purposes of the ordinance discussed above. In relying on the precise terms used in the ordinance, we fulfill our appellate role. Our function is properly limited to one of judicial review. *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). We decline the invitation to add new language to the provisions of the ordinance.

Moreover, our analysis does not end there. Where the parties offer competing views of the meaning of the terms of the ordinance, we examine them against the backdrop of the purposes and standards of the National Scenic Area Act itself. The purposes require protection and enhancement of the scenic, cultural, recreational, and natural resources of the Scenic Area. 16 U.S.C. § 544a(1). The standards require protection of agricultural lands, forest lands, open space and other resources as well. 16 U.S.C. § 544(d).

The consideration of the purposes and standards in the National Scenic Area Act further emphasizes why decisions made under the ordinance must adhere to them and guide our review. The implementation of the development review process that offers the greatest opportunity for evaluation of impacts to the resources of the Gorge, consistent with the text of the ordinance and the management plan, is preferred over one that does not. This precautionary principle simply ensures that development activities preceding adoption of the ordinance are not elevated to a special status that thwart the review requirements of the National Scenic Area Act.

For these reasons, we hold the governing body's application of the abandonment standard in its decision conflicts with the requirements of the ordinance. We also hold that by placing the burden of proof on Woodall to show abandonment, the decision below is in error. We reverse and remand based on Rule 350-60-220(c), (g) and (h).

In reaching this result, we also rely on the prior decisions of the Commission which result in review of development in a manner that complies with the terms of the ordinance in question. *See Friends v. Skamania County and Nature Friends Northwest*, CRGC No. COA-S-95-01 (November 16, 1995) ("The fidelity to the precise provisions of the National Scenic Area Act and the legislative history revealed in prior decisions of the courts of Washington and Oregon in interpreting the law underscore the standard we must adhere to in this appeal." Friends, 9).

We are also mindful of our earlier decisions under the interim guidelines which, as we found in *Friends v. Skamania County and Mills*, CRGC no. COA-S-95-02 (June 27, 1996), are instructive. However, we have not previously decided if the Commission is required to reach the same result in resolving a question of law arising under an ordinance that was also dealt with in a prior decision based on the interim guidelines. We do not determine that question today because

the result here is grounded on the ordinance before us and the analysis of this case, not the interim guidelines.[8]

Dated this 7th day of January, 1997.

/s/ ROBERT THOMPSON
Robert Thompson
Chair
Columbia River Gorge Commission

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[8] There are additional grounds for our decision in this case. First, the Columbia River Gorge Compact ensures the standards of the National Scenic Area Act govern the disposition of this case because the Gorge Compact, as a contract, transcends prior state law as Congress intended. RCW 43.97 *et seq.*; *Green v. Biddle*, 80 Wheat. 1 (1823); *State ex rel Dyer v. Sims*, 341 U.S. 22 (1950); *Seattle Master Bldrs. Ass'n v. Pacific Northwest Elec. Power Planning & Conservation Council*, 786 F.2d 1359 (9th Cir. 1986), cert denied, 479 U.S. 1059 (1987). Second, in the event there is a conflict between the standards of the National Scenic Area Act and prior state law, pre-emption occurs. *Columbia Gorge United v. Yeutter*, supra, at 115. In addition, we note the argument that prior state law supersedes the National Scenic Area Act and the Gorge Compact has been rejected. As the federal court determined in *Klickitat County v. Columbia River Gorge Commission*, 770 F. Supp. 1419 (E.D. Wash. 1991), state law does not apply unless it was specifically reserved in the Gorge Compact.

However, in light of the text of the ordinance, in the context of the National Scenic Area Act, we find it is unnecessary to rely on these additional grounds in the disposition of this case.

APPENDIX E

SKAMANIA COUNTY BOARD OF ADJUSTMENT RULING IN APPEAL OF DIRECTOR'S DECISION IN NSA FILE NO. 95-32

APPLICANT: Scott Anderson

FILE NO.: NSA 95-32

APPELLANT: Chris Woodall

BASIS OF APPEAL:

On August 1, 1995, the director of the Skamania County Department of Planning and Community Development approved the application of Scott Anderson for a comprehensive scenic review for an existing mobile home park located at milepost 34.11R of State Highway 14, in Section 35 of T2N, R6E, W.M. The full text of the director's decision in this matter is attached hereto as Exhibit 1 and by this reference incorporated herein. The director's decision in NSA 95-32 relied in large measure on the Staff Report prepared regarding this matter and dated July 12, 1995. A true and correct copy of the report is attached hereto as Exhibit 2 and by this reference incorporated herein.

Appellant Chris Woodall appealed from the director's decision based on §§ 22.06, 22.10 and 22.12 of Skamania County Code.

The Board of Adjustment heard testimony on this matter at a public hearing on October 17, 1995. Before the hearing, the Board of Adjustment determined the qualifications of its members to participate in the hearing. Based on the testimony and evidence presented at the hearing and the record and file herein, the Board of Adjustment makes the following findings of fact:

FINDINGS OF FACT:

1. The real property at issue is located at Milepost 34.11R, State Road 14, Skamania County, in Section 35, Township 2 North, Range 6 East of Willamette Meridian, Skamania County, Washington. The parcel also is identified as Skamania County Tax Lot No. 2-6-35-900.

2. The real property is located in a special management area forest zone and classified as use No. 15 by the Skamania County Assessor's Office. This designation is used for mobile home parks or courts in Skamania County.

Appellant, Chris Woodall, owns a mobile home park directly east of the park at issue in this case.

3. The property was previously owned for many years by Mr. Everett Russell and known as the Skamania Trailer Court. The property is currently owned by Messrs. Richard Bassett and David Peyton.

4. Southwest Washington Health Department records indicate that Mr. Russell operated the Skamania Trailer Court at its present location since at least 1969.

5. The Skamania County Mobile Home Park Inventory of 1974 listed the Skamania Trailer Court as a 10-site mobile home park.

6. The Skamania Trailer Court existed as a 10-site mobile home park on the effective date of the Scenic Area ordinance on October 15, 1991.

The use of the Skamania Trailer Park as a 10-site mobile home park has remained constant since at least the 1974 inventory.

7. Occupancy of the 10 sites at the Skamania Trailer Court has fluctuated since the Mobile Home Park Inventory of 1974. However, there is no evidence that the site ever held more than 10 or less than one mobile home(s) at any time

during the past 20 years. The park has been at full capacity at various times during the past 20 years.

8. Presently, there are three mobile homes situated on the Skamania Trailer Court property. Recreational vehicles also are permitted to use the Skamania Trailer Court's sites.

9. Each of the ten sites in the park have had electrical service in the past. When the present owners took possession of the property, they found the electrical lines were in good serviceable condition. The owners have not had to make any repairs to these lines.

10. Each of the ten home sites in the park have had water service in the past. Water lines are currently serviceable to all 10 units. As with the electrical lines, the current owners did not make any repairs to the water lines in order to obtain services to all 10 sites. They made minor repairs to water fixtures only.

11. Skamania Trailer Park's owners have never filed a petition to vacate the mobile home site as provided for in Skamania County Ordinance 18.48.010.

12. None of the utility services within the Skamania Trailer Court have ever been removed.

13. The use of the subject parcel as a 10-site mobile home park has not been discontinued for a period of one year at any time in its history. The Skamania Trailer Court has always been used exclusively as a mobile home park without interruption since at least the Skamania Mobile Home Park inventory of 1974.

CONCLUSION/ORDER:

1. Skamania County Ordinance 18.48.010 holds that mobile home parks in Skamania County are abandoned by filing a petition to vacate with the Skamania County Board of County Commissioners. Since no such petition was filed, the

use of this property as a ten-site mobile home park has not been abandoned in this manner.

2. The Skamania Trailer Court's use as a ten-site mobile home park was a valid existing and permitted use as of October 15, 1991 and, therefore, is considered a valid nonconforming use.

3. Having found the Skamania Trailer Court's use as a ten-site mobile home park to be a valid nonconforming use, the burden of proving that it was abandoned rests with the appellant according to Washington law.

4. Under Washington law, nonconforming uses are vested property rights which are protected and cannot be lost or easily voided.

5. The use of the Skamania Trailer Court as a ten-site mobile home park has not been abandoned since the Skamania County Mobile Home Park Inventory of 1974.

6. Washington case law through *Keller v. City of Bellingham,* 92 Wash.2d. 726 (1979), supports Skamania Trailer Court's use as a ten-site mobile home park as consistent with the original intent and design of the property.

The Skamania County Board of Adjustment orders that the director's decision in NSA file no. 95-32, approving an application for a comprehensive scenic review for the Skamania Trailer Court, is affirmed in its entirety.

DATED this 7th day of December, 1995.

SKAMANIA COUNTY BOARD OF ADJUSTMENT

By: /s/ Charlotte Payne, Chairman
CHARLOTTE PAYNE

By: _____

By: _____

By. _____

[Logo] Skamania County EXHIBIT 1
Department of Planning and
Community Development

Susan K Lourne
Director
Harpreet Sandhu
Long-Range Planner
Mark J. Mazeski
Senior Current Planner
Wayne A. Nelsen
Associate Current Planner
Kathy Pearson
Staff Assistant

Director's Decision

APPLICANT: Scott Anderson

FILE NO.: NSA-95-32

PROJECT: Comprehensive Scenic Review in order to allow for the replacement of each mobile home/RV without requiring individual National Scenic Area review for each replacement. Placement of any mobile home/RV on each of the 10 sites is allowed proved each replacement complies with the conditions set out below.

LOCATION: MP 34.11R of State Highway 14, in Section 35 of T2N, R6E, W.M., and identified as Skamania County Tax lot #2-6-35-900.

ZONING: Forest in the Special Management Area.

DECISION: Based upon the entire record before the Director, including particularly the Staff Report, the application by Scott Anderson for a comprehensive scenic review for an existing mobile home park, subject to the

conditions set forth in this Decision, is found to be consistent with Title 22 SCC and is hereby approved.

Approval of this request does not exempt the applicant or successors in interest from compliance with all other applicable local, state, and federal laws.

CONDITIONS OF APPROVAL:

The following conditions are required to ensure that the subject request is consistent with Skamania County Title 22. This document, outlining the conditions of approval, must be recorded in the deed records of the Skamania County Auditor in order to ensure notice of the conditions of approval to successors in interest. SCC §22.06.050(C)(2).

1) Any future development which does not include the placement or replacement of mobile homes within the park and exceeds the general maintenance and repair of the existing mobile home park is subject to all. applicable provisions of the Scenic Area Ordinance. The Department shall confirm, prior to the issuance of any placement permits, that the park is in full compliance with all conditions of approval. In the event that the park is not in compliance, notwithstanding other avenues of enforcement, no additional placement permits or occupancy permits shall be issued for the subject park.

2) The mobile home park is limited to 10 independent single wide mobile home or recreational vehicle (RV) sites. Any mobile home or RV which is larger then a single wide and/or is not independent (containing bathroom facilities) may not be placed on the subject property without prior approval of an amended Mobile Home Park Plan, filed pursuant to SCC Title 18 and subject to all applicable provisions of the Scenic Area Ordinance.

3) Maintenance, repair and restoration of existing septic systems, waterlines, and electrical utilities shall be permitted so tong as the original size, scope and configuration is not in excess of the original design.

5) All mobile homes placed in the mobile home park are to be finished in dark colors and be either natural or earth-tone colors and all serviced RV's that are placed in the park for more than 60 days in any 12 month period shall be finished in the same manner. Furthermore, prior to issuance of a placement permit, a potential tenant must submit color samples to the Department to verify consistency with this criterion. A mobile home or RV shall not be given final placement inspection approval until the unit is found to be in full compliance with the required colors.

6) Only those RV's that are not occupied, are not hooked up to any utilities and whose owners reside in a mobile home within the park are allowed to be stored on the subject property without complying with the conditions stated herein.

7) Exterior lighting shall be directed downward and sited, hooded and shielded such that it is not highly visible from key viewing areas. Shielding and hooding materials shall be composed of non-reflective, opaque materials.

8) All existing vegetative screening is to be retained and maintained in a healthy condition. Any existing vegetative screening that dies or is significantly damaged shall be replaced in kind.

9) For every new mobile home or RV placed in the park, not including those to be placed at a site that has been occupied within the previous 12 month period of the date of placement of the new mobile home, two additional trees shall be planted. Said trees shall be placed within 15 feet of any portion of the respective

mobile home or RV and shall be retained and maintained in a healthy condition after that mobile home or RV has vacated the premises. Additional screening shall be required until such a time that a total of 20 trees have been planted and continue to exist simultaneously. Any tree planted for screening purposes must be replaced in kind if that tree should die or is significantly damaged.

a) At least half of any trees planted for screening purposes shall be species native to the setting.

b) At least half of any trees planted for screening purposes shall be coniferous to provide winter screening.

10) A continuous vegetation barrier shall be planted along the entire property line that fronts State Highway 14. This barrier shall consist of one row of trees with a minimum height of 6', planted on 12' centers. Existing trees may be substituted in the planting scheme.

a) At least half of any trees planted for screening purposes shall be species native to the setting.

b) At least half of any trees planted for screening purposes shall be coniferous to provide winter screening.

11) A continuous vegetation barrier shall be planted along the southern property line. This barrier shall consist of one row of trees with a minimum height of 4', planted on 16' centers. Existing trees may be substituted in the planting scheme.

a) At least half of any trees planted for screening purposes shall be species native to the setting.

b) At least half of any trees planted for screening purposes shall be coniferous to provide winter screening.

12) A final landscaping plan, including height and type of each tree, shall be submitted to the Department and approved by the Department for compliance with these conditions, prior to the issuance of any placement permits.

Dated and Signed this 1st day of August, 1995, at Stevenson, Washington.

/s/ Harpreet Sandhu, Director
HARPREET SANDHU
Skamania County Planning and Community Development.

NOTES

Any new residential development, related accessory structures such as garages or workshops, and additions or alterations not included in this approved site plan, will require a new application and review.

As per SCC §22.06.050(C)(2), the Director's Decision shall be recorded in the County deed records prior to commencement of the approved project.

As per SCC §22.06.050(C)(5), the decision of the Director approving a proposed development action shall become void in two years if the development is not commenced within that period, or when the development action is discontinued for any reason for one continuous year or more.

APPEALS

The decision of the Director shall be final unless a written Notice of Appeal is filed by an interested person within 20 days from the date hereof. Appeal may be made to the Skamania County Board of Adjustment, P.O. Box 790, Stevenson, WA 98648. Notice of Appeal forms are available at the Department Office.

A copy of the Decision was sent to the following:

Adjacent Property Owners w/500 feet of the subject property
Skamania. County Building Department
Skamania County Assessor's Office

A copy of this Decision, including the Staff Report, was sent to the following:

Persons submitting written comments in a timely manner
Yakama Indian Nation
Confederated Tribes of the Umatilla Indian Reservation
Confederated Tribes of the Warm Springs
Nez Perce Tribe
Columbia River Gorge Commission
U.S. Forest Service - NSA Office

[Logo] Skamania County EXHIBIT 2

Department of Planning and
Community Development
Skamania County Courthouse Annex
Post Office Box 790
Stevenson, Washington 98648
(509) 427-9458 FAX: (509) 427-4839

Susan K. Lourne
Director
Harpreet Sandhu
Long-Range Planner
Mark J. Mazeski
Senior Current Planner
Wayne A. Nelsen
Associate Current Planner
Kathy Pearson
Staff Assistant

STAFF REPORT

National Scenic Area—Comprehensive Scenic Review
File No. NSA-95-32

Scott Anderson

July 12, 1995

This staff report addresses the application of Scott Anderson, who is requesting a comprehensive review of an existing 10-site mobile home park in order to allow replacement of each unit without requiring individual National Scenic Area review for each replacement. The subject parcel is zoned Forest and is within the Special Management Area; located at MP 34.11R of State Highway 14, in Section 35 of T2N, R6E, W.M., and identified as Skamania County Tax Lot #2-6-35-900.

FINDINGS:

access	State Highway 14
improvements-	existing 10 space mobile home park
lot size-	1.91 acres

National Scenic Area Zoning- Forest in the Special Management Area

prior actions - NSA-95-31: Scenic review for the replacement of an existing mobile home.

site visit- April 18, 1995

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Chapter 22.06 ADMINISTRATION

§22-06-090

B. *Existing Uses in Special Management Areas.*

1. The provisions of subsections (A)(1), (2), (3), (4), (5) and (6) above, apply in Special Management Areas as well as General Management Areas.

Finding: The applicable provisions are listed below

A. *Existing Uses in General Management Areas.*

1. Except to the extent specifically set forth below, any use or structure existing on October 15, 1991 may continue so long as it is used in substantially the same manner and for the same purpose as on that date.

Finding: The Scenic Area Ordinance defines an existing use or structure as, "a use that existed before the effective date of this Title and was established in accordance with the law in effect at the time of establishment of the use." SCC § 22.04.010(57)

The subject mobile home park was listed on the 1974 Skamania County Mobile Home Park

Inventory recorded on February 19, 1986, pursuant to County Ordinance No. 73-4, adopted October 29, 1973 by the Board of County Commissioners. The Inventory indicates that the subject mobile home park, identified as Skamania Trailer Court, contains 10 independent single wide mobile home sites. See Exhibits A and B.

Although all 10 mobile home sites have not been occupied at all times since the establishment of the mobile home park, a mobile home site may only be vacated by petition of the legal owner(s) of said site to the Board of County Commissioners (Ord. 73-4 S15.0). SCC § 18.48.010

Furthermore, at all times since its inception, the park has been used and assessed as a mobile home park. The park has only been at less than full capacity due to market conditions and/or the then current management style. At no time has there been any evidence of abandonment of any or all of the 10 inventoried sites.

Therefore, because the mobile home park existed prior to the effective date of the Scenic Area Ordinance and was established in accordance with the law in effect at the time of establishment of the use (Skamania County Ord. No. 73-4), the 10 site mobile home park is considered to be an existing use and shall be permitted to operate as such.

Rather than conducting a complete review for each mobile home that is placed and/or placed within the park, this Staff Report and the Directors Decision should serve as a one-time comprehensive review of the entire park for impact to scenic resources. The only additional review that

the Department will perform will occur when a mobile home is actually placed on the site. At such time, the Department will confirm that each new unit is in full compliance with the conditions established herein. If the mobile home park is found to be in violation of said conditions, no additional placements or new development should be allowed to occur on the premises until all existing development is found to be in full compliance.

This review is limited to the placement and replacement of mobile homes or recreational vehicles (RV's) only. Any other development that exceeds the standard operation and general repair and maintenance of the existing 10-site mobile home park is subject to all applicable provisions of the Scenic Area Ordinance. Also, see Finding for §22.10.020(A)(2), below.

The Scenic Area Ordinance defines repair and maintenance as, an activity that restores the size, scope, configuration, and design of a serviceable structure to its previously authorized and undamaged condition. Activities that change the size, scope, and configuration of a structure beyond its original design are not included in this definition."

Therefore, restoration of the existing septic systems, waterlines, and electricity utilities is allowed without review, as long as the original size, scope, or configuration is not exceeded beyond the original design.

2. Replacement or reestablishment of a use or structure discontinued for one year shall be subject to the provisions of this Title.

Finding: *The use of the subject parcel as a 10-site mobile home park has not been discontinued for a period of more than one year. Since 1975, the County Assessor's Office has listed and assessed the subject property as a 10-site mobile home park. Since that time the park has not always been filled to capacity, but has always been used as a mobile home park without any interruptions.*

3. Not Applicable.

4. An existing use or structure may be replaced within one year of discontinuation of the use or structure if the replacement use or structure will be used for the same purpose, at the same location, subject to applicable provisions of this title protecting scenic, cultural, natural and recreational resources.

Finding: *As stated above, the existing use of the subject property as a mobile home park has not been abandoned since the 1974 Inventory. As such, the park may continue and each of the 10 spaces may contain a mobile home provided they are single-wides (original inventoried size), and comply with the applicable provision protecting scenic, cultural, natural and recreational resources, as set out below.*

5. Not applicable.

6. All replacement structures shall comply with all relevant provisions of Chapter 22.10 of this title and other applicable laws.

Finding: *See analysis of compliance with Chapter 22.10, below.*

7. and 8. Not applicable.

Chapter 22.10 *SCENIC RESOURCE PROTECTION*

§22.10.020

A. *Standards Governing All New Developments.*

1. Not Applicable.

2. New buildings shall be generally consistent with the height and size of existing nearby development of similar nature.

Finding: *The mobile home park is limited to 10 independent single wide mobile home or RV sites. Any mobile home or RV which is larger than a single wide and/or is not independent (an independent mobile home or RV contains bathroom facilities) may not be placed on the subject property without prior approval of an amended Mobile Home Park Plan, filed pursuant to SCC Title 18 and subject to all applicable provisions of the Scenic Area Ordinance.*

3. A site plan shaft be submitted in conjunction with a building permit for all new buildings, except those smaller than 60 square feet in area and less than 18 feet in height, as measured at the roof peak.

Finding: *An appropriate site plan has been submitted.*

4. A determination of compatibility with the landscape setting shall be made by the Director and shall be based upon information submitted in the site plan.

Finding: *The subject property is designated as having a coniferous woodlands landscape setting. New development in this setting shall meet the design provisions for landscape settings in general and those listed under the Coniferous Woodlands*

landscape setting. Consistency with the landscape settings will be addressed in §22.10.020(C), below.

B. *Additional Standards Governing New Developments Visible from Key Viewing Areas.*

1. Size, height, shape, color, reflectivity, landscaping, siting or other aspects of proposed developments shall be evaluated to ensure that such development is visually subordinate to its setting as seen from key viewing areas.

Finding: The aspects listed above are addressed individually below.

2. The extent and type of conditions applied to a proposed development to achieve visual subordinance should be proportionate to its potential visual impacts as seen from key viewing areas. Factors influencing the degree of potential visual impact include:

(a) The amount of area of the building site exposed to key viewing areas,

Finding: A majority of the mobile home park is exposed to key viewing areas.

(b) The degree of existing vegetation providing screening,

Finding: A moderate amount of existing vegetation provides screening for the mobile home park.

(c) The distance from the building site to the key viewing areas from which it is visible,

Finding: The park is adjacent to State Highway 14 and approximately 1/2 to 2 miles away from all other key viewing areas from which it is visible.

(d) The number of key viewing areas from which it is visible, and

Finding: *The park is visible from four key viewing areas: State Highway 14, the Columbia River, I-84, and Beacon Rock.*

(e) For linear key viewing areas such as roads, the linear distance along the key viewing areas from which the site is visible.

Finding: *The site is visible from approximately 300 feet along State Highway 14.*

3. Determination of potential visual effects shall include consideration of the cumulative effects of proposed developments.

Finding: *The potential visual effects of the cumulative effects of the mobile home park are significant. Presently, approximately 1/3 of the sites are occupied by either mobile homes or RV's, which does not pose a significant threat to scenic resources. However, if the park were to be filled to capacity, the visual effects would increase dramatically, especially when adding the additional impacts from the existing Beacon Rock Mobile Home Park to the east. Conditions of approval must be placed on the park in order to reduce visual impacts. The imposition of a condition requiring that all mobile homes/Rvs be dark colors will reduce the visual impacts created by the 10 units.*

4.-7. Not Applicable.

8. The exterior of buildings on lands seen from key viewing areas shall be composed of nonreflective materials or materials with low reflectivity, unless the structure would be fully

screened from all key viewing areas by existing topographic features

Finding: The exteriors of mobile homes and RV's are generally highly reflective, as they are often composed of metal siding. Therefore, a condition of approval should require that all mobile homes placed in the subject park are to be finished in either natural or earth-tone colors and all serviced RV's that are placed in the park for more than 60 days in any 12 month period shall be finished in either natural or earth-tone colors. Furthermore, prior to issuance of a placement permit, a potential tenant should submit color samples for trim, roof and siding to the Department to verify consistency with the above criterion. A mobile home or RV should not be given final placement inspection approval until the unit is found to be in full compliance with the required colors.

The two mobile homes and laundry facilities building that are currently located in the park are the only structures not required to comply with the conditions stated above, until such time that they are replaced. Also, RV's that are unoccupied, are not hooked up to any utilities and whose owners reside in a mobile home within the park are allowed to be stored on the subject property without complying with the above conditions.

9. Exterior lighting shall be directed downward and sited, hooded and shielded such that it is not highly visible from key viewing areas. Shielding and hooding materials shall be composed of nonreflective, opaque materials.

Finding: A condition of approval should require compliance with the above provisions.

10.-11. Not Applicable.

12. The silhouette of new buildings shall remain below the skyline of a bluff, cliff or ridge as seen from key viewing areas.

Finding: The park is not located on or near a skyline.

18. Except for water-dependent development and for water-related recreation development, development shall be set beck 100 feet from the ordinary-high water mark of the Columbia River below Bonneville Dam, and 100 feet from the normal pool elevation of the Columbia River above Bonneville Dam.

Finding: The park is approximately 1500 feet from the Columbia River.

19-26. Not Applicable.

C. *Landscape Settings*

1. General Provisions

b) New development in all landscape settings shall be compatible with the general scale (height, dimensions, overall mass) of similar development in the vicinity. Expansion of existing development shall comply with this provision to the maximum extent practicable.

Finding: See Finding for § 22.10.020(A)(2), above.

3. Coniferous Woodland.

a) Structure height shall remain below the forest canopy level.

Finding: The height of the trees surrounding the subject property exceed 40 feet. Single wide mobile homes and RV's will remain below the forest canopy.

b) In portions of the setting visible from key viewing areas, the following provisions shall be employed to achieve visual subordinance:

Finding: The setting is visible from key viewing areas, and therefore, is subject to the following provisions.

i) Except as necessary for construction of access roads, building pads, leach fields, etc., the existing tree cover screening the development from key viewing areas shall be retained.

Finding: No additional clearing is required to place mobile homes or RV's in the park. However, because the existing vegetation provides screening from key viewing areas, a condition of approval should require that all existing vegetation be retained and maintained in a healthy condition. Furthermore, any existing vegetative screening that dies or is significantly damaged should be replaced in kind.

ii) At least half of any trees planted for screening purposes shall be species native to the setting. Such species include Douglas fir, grand fir, western red cedar, western hemlock, big leaf maple, vine maple, red alder, ponderosa pine, Oregon white oak and various native willows (for riparian areas).

Finding: A condition of approval should require that for every new mobile home to be placed in the park, not including those to be placed at a site that has already been planted, that two 4' tall trees shall be planted. Said trees shall be placed within 15 feet of the respective mobile home or RV, be located

between the unit and State Highway 14, and shall be retained and maintained in a healthy condition after that mobile home or RV has vacated the premises. Additional screening shall be required until such a time that a total of 20 trees have been planted and continue to exist simultaneously. Any tree planted for screening purposes must be replaced in kind if that tree should die or is significantly damaged. At least half of any trees planted for screening purposes shall be species native to the setting, as specified above in this criterion.

Notwithstanding the above, a continuous vegetation barrier should be planted along the entire property line that fronts State Highway 14. This barrier should consist of one row of trees, with a minimum height of 6'. planted on 12' centers. Existing trees may be substituted in the planting scheme.

The applicant's site plan shows a row of arborvitae to be planted as a screening. Some arborvitae may be used, however compliance with this criterion, specifying trees native to the setting, should be a condition of approval. A condition of approval should specify that the screening along State Highway 14 be planted in its entirety prior to the issuance of any placement permits.

Additionally, screening is necessary on the southern property line in order to screen the park from the Columbia River. Said screening only needs to be placed on 16' centers and consist of 4' tall trees since existing vegetation on property owned by others already effectively screens the park. However, those trees may be removed by the landowners so additional screening is necessary.

As stated above, these trees should be planted prior to issuance of any placement permits.

iii) At least half of any trees planted for screening purposes shall be coniferous to provide winter screening.

Finding: A condition of approved should require that the above specified planting should comply with this criterion. A condition of approval should require that a final landscaping plan, including height and type of each tree should be submitted prior to issuance of any placement permits.

iv) The exteriors of structures shall be either natural or earth-tone colors, unless specifically exempted elsewhere in this Section.

Finding: A condition of approval should require that all mobile homes placed in the subject park are to be finished in either natural or earth-tone colors and all serviced RV's that are placed in the park for more than 60 days in any 12 month period shall be finished in either natural or earth-tone colors. Furthermore, prior to issuance of a placement permit, a potential tenant must submit color samples to the Department to verify consistency with the above criterion. A mobile home or RV should not be given final placement inspection approval until the unit is found to be in full compliance with the required colors.

Chapter 22.12 *RECREATIONAL RESOURCE PROTECTION*

A. APPLICABILITY OF SECTION

This section applies only to resource-based recreation uses, developments and facilities. Recreation uses and develop-

ments that are not resource-based in nature are not subject to the provisions governing recreation intensity classes set out in this Chapter. Non-resource-based recreation uses may be permitted pursuant to the provisions of Chapter 22.08 (Zoning).

Finding: The proposed development is not a resource-based recreation use, development or facility. Therefore, the project is exempt from the provisions of this Chapter.

• "Recreation sites shall be protected from adjacent uses that would detract from their use and enjoyment." *Management Plan for the Columbia River Gorge National Scenic Area, p.11-96.*

Finding: Washington State Parks and Recreation Commission submitted written comments dated June 2, 1995, attached as Exhibit C. These comments address the issue of visual effect that this application will have upon the Doetsch Ranch property (now owned by Washington Parks and Recreation), located south of the subject property. The analysis and mitigation for scenic impacts listed above should address the issues raised in that letter.

Chapter 22.14 *WATER RESOURCE PROTECTION*

Finding: The wetland maps provided by the U.S. Forest Service do not identify any streams, ponds, rivers or wetlands on or within 200 feet of the proposed development site. The site visit by Mark J. Mazeski and Wayne Nelsen, staff planners, did not reveal any streams, ponds, rivers or wetlands on or near the development site.

Chapter 22.16 *WILDLIFE AND PLANT HABITAT PROTECTION*

Finding: Repair, maintenance and operation of this existing mobile home park is categorically exempt from review.

Chapter 22.16 *CULTURAL RESOURCE PROTECTION*

§ 22.18.020

A. *Reconnaissance Surveys and Reports Required; Exceptions*

2. A reconnaissance survey shall be required for all proposed uses, except:

c) Proposed uses that involve minor ground disturbance, ...; and placement of mobile homes where septic systems and underground utilities are not involved. The Gorge Commission shall review all land use applications and determine if the proposed uses would have a minor ground disturbance.

Finding: Attached as Exhibit D is the cultural resource evaluation by Thomas Turck, USFS National Scenic Area office. Mr. Turck Performs the cultural resource review for the Gorge Commission. Mr. Turck has concluded that this project is exempt from requiring a reconnaissance survey and report.

APPENDIX F

Public Law 99-663
99th Congress

An Act

To protect and provide for the enhancement of the resources of the Columbia River Gorge, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

This Act may be referred to as the "Columbia River Gorge National Scenic Area Act".

TABLE OF CONTENTS

Sec. 1. Short title and table of contents.
Sec. 2. Definitions.
Sec. 3. Purposes.
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Sec. 6. The scenic area management plan.
Sec. 7. Administration of the scenic area.
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Sec. 15. Enforcement.
Sec. 16. Authorization of appropriations.
Sec. 17. Savings provisions.
Sec. 18. Severability.

SEC. 2. (16 U.S.C. § 544) DEFINITIONS.

As used in this Act, the term—

(a) "adversely affect" or "adversely affecting" means, except as used in section 15, a reasonable likelihood of more than moderate adverse consequences for the scenic, cultural, recreation or natural resources of the scenic area, the determination of which is based on—

(1) the context of a proposed action;

(2) the intensity of a proposed action, including the magnitude and duration of an impact and the likelihood of its occurrence;

(3) the relationship between a proposed action and other similar actions which are individually insignificant but which may have cumulatively significant impacts; and

(4) proven mitigation measures which the proponent of an action will implement as part of the proposal to reduce otherwise significant affects to an insignificant level;

(b) "agricultural lands" means lands designated as agricultural lands pursuant to section 6 of this Act;

(c) "Commission" means the Columbia River Gorge Commission established pursuant to section 5 of this Act;

(d) "counties" means Hood River, Multnomah, and Wasco Counties, Oregon; and Clark, Klickitat, and Skamania Counties, Washington;

(e) "Dodson/Warrendale Special Purchase Unit" means the Dodson/Warrendale Special Purchase Unit established pursuant to section 4 of this Act;

(f) "forest lands" means lands designated as forest lands pursuant to section 6 of this Act;

(g) "Indian tribes" means the Nez Perce Tribe, the Confederated Tribes and Bands of the Yakima Indian Nation, the Confederated Tribes of the Warm Springs of Oregon, and the Confederated Tribes of the Umatilla Indian Reservation;

(h) "interim guidelines" means any interim guidelines developed by the Secretary pursuant to section 10 of this Act, and any amendment, revision, or variance;

(i) "land use ordinance" or "ordinance" means any ordinance adopted by a county or by the Commission pursuant to this Act, and includes any amendment to, revision of, or variance from such ordinance;

(j) "major development actions" means any of the following:

(1) subdivisions, partitions and short plat proposals;

(2) any permit for siting or construction outside urban areas of multifamily residential, industrial or commercial facilities, except such facilities as are included in the recreation assessment;

(3) the exploration, development and production of mineral resources unless such exploration, development or production can be conducted without disturbing the surface of any land within the boundaries of a special management area or is for sand, gravel and crushed rock used for the construction, maintenance or reconstruction of roads within the special management areas used for the production of forest products; and

(4) permits for siting or construction within a special management area of any residence or other related major structure on any parcel of land less than forty acres in size;

(k) "management plan" means the scenic area management plan adopted pursuant to section 6 of this Act;

(l) "open spaces" means unimproved lands not designated as agricultural lands or forest lands pursuant to section 6 of this Act and designated as open space pursuant to section 6 of this Act. Open spaces include—

(1) scenic, cultural, and historic areas;

(2) fish and wildlife habitat;

(3) lands which support plant species that are endemic to the scenic area or which are listed as rare, threatened or endangered species pursuant to State or Federal Endangered Species Acts;

(4) ecologically and scientifically significant natural areas;

(5) outstanding scenic views and sites;

(6) water areas and wetlands;

(7) archaeological sites, Indian burial grounds and village sites, historic trails and roads and other areas which are culturally or historically significant;

(8) potential and existing recreation resources; and

(9) Federal and State wild, scenic, and recreation waterways;

(m) "recreation assessment" means the recreation assessment adopted pursuant to section 6 of this Act;

(n) "residential development" means the permitting for siting or construction of any residence or other related major structure;

(o) "scenic area" means the Columbia River Gorge National Scenic Area established pursuant to section 4 of this Act;

(p) "Secretary" means the Secretary of Agriculture;

(q) "special management areas" means areas within the scenic area established pursuant to section 4 of this Act;

(r) "States" means the States of Oregon and Washington; and

(s) "urban areas" means those areas within the scenic area identified as urban areas on the map referred to in section 4(e) of this Act or within the boundaries of an urban area as revised pursuant to section 4(f).

SEC. 3. (16 U.S.C. § 544a) PURPOSES.

The purposes of this Act are—

(1) to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge; and

(2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with paragraph (1).

SEC. 4. (16 U.S.C. § 544b) ESTABLISHMENT OF THE SCENIC AREA.

(a) NATIONAL SCENIC AREA.—(1) There is hereby established the Columbia River Gorge National Scenic Area.

(2) The boundaries of the scenic area shall be generally depicted on the map entitled "Boundary Map, Columbia River Gorge National Scenic Area," numbered NSA-001 sheets 1 and 2, and dated September 1986, which shall be on file and available for public inspection in the offices of the Commission and of the Chief, Forest Service.

(b) SPECIAL MANAGEMENT AREAS.—(1) The following areas within the boundaries of the scenic area are hereby designated "Special Management Areas": Gates of the Columbia River Gorge; Wind Mountain; Burdoin Mountain; and Rowena.

(2) The boundaries of the special management areas designated in this section—

(A) shall be generally depicted on the map entitled "Special Management Areas, Columbia River Gorge National Scenic Area", numbered SMA-002 sheets 1 through 17, and dated September 1986, which shall be on file and available for public inspection in the offices of the Commission and of the Chief, Forest Service; and

(B) shall include all islands within the boundaries of the scenic area.

(c) REVISION OF SPECIAL MANAGEMENT AREA BOUNDARIES.—The Secretary, in consultation with the Commission, may make minor revisions in the boundaries of special management areas after publication of notice to that effect in the Federal Register and submission of notice thereof to the Committee on Energy and Natural Resources of the United States Senate and the Committees on Agriculture and Interior and Insular Affairs of the United States House of Representatives. Such notice shall be published and submitted at least sixty days before the revision is made. Notice of final action regarding such revision shall also be published in the Federal Register.

(d) DODSON/WARRENDALE SPECIAL PURCHASE UNIT.—(1) There is hereby established the Dodson/ Warrendale Special Purchase Unit.

(2) The boundaries of the Dodson/Warrendale Special Purchase Unit shall be generally depicted on the map entitled "Dodson/Warrendale Special Purchase Unit, Columbia River Gorge National Scenic Area", numbered SPU-003 sheet 1, and dated September 1986, which shall be on file and available for public inspection in the offices of the Commission and of the Chief, Forest Service.

(e) URBAN AREAS.—(1) The following cities and towns are hereby designated as "Urban Areas": Cascade

Locks, Hood River, Mosier, and The Dalles, Oregon; and Bingen, Carson, Dallesport, Home Valley, Lyle, North Bonneville, Stevenson, White Salmon, and Wishram, Washington.

(2) The boundaries of urban areas shall be generally depicted on the map entitled, "Urban Areas, Columbia River Gorge National Scenic Area", numbered UA-004 sheets 1 through 11, and dated September 1986, which shall be on file and available for public inspection in the offices of the Commission and of the Chief, Forest Service. The boundaries of urban areas designated in this subsection may be revised pursuant to the provisions of this section.

(f) REVISION OF URBAN AREA BOUNDARIES.—(1) Upon application of a county and in consultation with the Secretary, the Commission may make minor revisions to the boundaries of any urban area identified in subsection 4(e) of this section. A majority vote of two-thirds of the members of the Commission, including a majority of the members appointed from each State, shall be required to approve any revision of urban area boundaries.

(2) The Commission may revise the boundaries of an urban area only if it finds that—

(A) a demonstrable need exists to accommodate long-range urban population growth requirements or economic needs consistent with the management plan;

(B) revision of urban area boundaries would be consistent with the standards established in section 6 and the purposes of this Act;

(C) revision of urban area boundaries would result in maximum efficiency of land uses within and on the fringe of existing urban areas; and

(D) revision of urban area boundaries would not result in the significant reduction of agricultural lands, forest lands, or open spaces.

SEC. 5. (16 U.S.C. § 544c) THE COLUMBIA RIVER GORGE COMMISSION.

(a) ESTABLISHMENT AND MEMBERSHIP OF THE COMMISSION.—(1) To achieve the purposes of this Act and to facilitate cooperation among the States of Oregon and Washington, and with the United States of America, the consent of Congress is given for an agreement described in this Act, pursuant to which, within one year after the date of enactment of this Act—

(A) the States of Oregon and Washington shall establish by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission, and shall incorporate this Act by specific reference in such agreement. The Commission shall carry out its functions and responsibilities in accordance with the provisions of the interstate agreement and of this Act and shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law;

(B) the States of Oregon and Washington shall provide to the Commission, State agencies, and the counties under State law the authority to carry out their respective functions and responsibilities in accordance with the provisions of paragraph (1)(A) of this subsection; and

(C) the States of Oregon and Washington shall appoint members of the Commission as provided in clauses (i) through (iii), subject to applicable State law: Provided, That the Governor of either State may extend the time for appointment of Commission members ninety days to provide more time for the States and counties to make such appointments. Membership of the Commission shall be as follows:

(i) six members, comprised of one resident from each of the following counties: Hood River, Mulnomah, and Wasco Counties, Oregon, and Clark, Klickitat, and Skamania

Counties, Washington, to be appointed by the governing body of each of the respective counties: Provided, That in the event the governing body of a county fails to make such appointment, the Governor of the State in which the county is located shall appoint such member;

(ii) three members who reside in the State of Oregon, at least one of whom shall be a resident of the scenic area, to be appointed by the Governor of Oregon;

(iii) three members who reside in the State of Washington, at least one of whom shall be a resident of the scenic area, to be appointed by the Governor of Washington; and

(iv) one ex officio, nonvoting member who shall be an employee of the Forest Service, to be appointed by the Secretary.

(2) The agreement shall take effect and the Commission may exercise its authorities pursuant to the agreement upon the appointment of four initial members from each State, subject to applicable State law, and the date of such an agreement shall be the date of establishment of the Commission. Such agreement is hereby consented to by the Congress.

(3) Either State or any county may fill any vacancy occurring prior to the expiration of the term of any member originally appointed by that State or county. Each member appointed to the Commission shall serve a term of four years, except that, with respect to members initially appointed pursuant to paragraph (1)(C)(i), each Governor shall designate one member to serve for a term of five years and one to serve for a term of six years, and one member from each State initially appointed pursuant to paragraph (1)(C)(ii) and (iii) shall be designated by the Governor to serve a term of five years, and one to serve a term of six years. Neither the

Governors nor the governing bodies of any of the counties may appoint Federal, State, or local elected or appointed officials to the Commission.

(4) A majority of the members of the Commission shall constitute a quorum. The members of the Commission shall select from among themselves a Chairman by majority vote of the members appointed from each State.

(5) Except for the ex-officio member appointed pursuant to paragraph (1)(C)(iv), the members and officers and employees of the Commission shall not be officers or employees of the United States for any purpose. The Commission shall appoint, fix compensation for, and assign and delegate duties to such officers and employees as the Commission deems necessary to fulfill its functions under this Act. The compensation of Commission members shall be fixed by State law. The compensation of Commission members, officers, and employees and the expenses of the Commission shall be paid from funds provided to the Commission by the States.

(b) APPLICABLE LAW.—For the purposes of providing a uniform system of laws, which, in addition to this Act, are applicable to the Commission, the Commission shall adopt regulations relating to administrative procedure, the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Commission, advisory committees, and disclosure of information consistent with the more restrictive statutory provisions of either State. Regulations applicable to financial disclosure under this subsection shall be applied to members of the Commission without regard to the duration of their service on the Commission or the amount of compensation received for such service. No contract, obligation, or other action of the Commission shall be an obligation of the United States or an obligation secured by the full faith and credit of the United States.

(c) ASSISTANCE TO THE COMMISSION.—Upon the request of the Commission, the Secretary and other Federal agencies are authorized to provide information, personnel, property, and services on a reimbursable basis, and the Secretary is authorized to provide technical assistance on a nonreimbursable basis, to the Commission to assist it in carrying out its functions and responsibilities pursuant to this Act.

(d) ADVISORY COMMITTEES.—The Commission shall establish voluntary technical and citizen advisory committees to assist the Commission in carrying out its functions and responsibilities pursuant to this Act.

SEC. 6. (16 U.S.C. § 544d) THE SCENIC AREA MANAGEMENT PLAN.

(a) STUDIES.—Within one year after the date the Commission is established, it shall, in cooperation with the Secretary, complete the following studies for use in preparing the management plan:

(1) RESOURCE INVENTORY.—The Commission shall complete a resource inventory. The resource inventory shall—

(A) document all existing land uses, natural features and limitations, scenic, natural, cultural, archaeological and recreation and economic resources and activities: Provided, That the location of any Indian burial grounds, village sites, and other areas of archaeological or religious significance shall not be made public information and such information shall be used for administrative purposes only; and

(B) incorporate without change the resource inventory developed by the Secretary pursuant to section 8 of this Act for the special management areas.

(2) ECONOMIC OPPORTUNITY STUDY.—The Commission shall complete a study to identify opportunities to enhance the economies of communities in the scenic area in a manner consistent with the purposes of this Act.

(3) RECREATION ASSESSMENT.—The Commission shall complete an assessment of recreation resources and opportunities for enhancement of these resources. The recreation assessment shall—

(A) designate the location and specify the construction of an interpretive center or other appropriate facility, to be located in the State of Oregon, and of a conference center or other appropriate facility, to be located in the State of Washington;

(B) identify areas within the scenic area that are suitable for other public use facilities, including but not limited to educational and interpretive facilities, campsites, picnic areas, boat launch facilities and river access areas; and

(C) subject to the treaty and other rights of Indian tribes, designate areas to provide increased access for recreation purposes to the Columbia River and its tributaries; and

(D) incorporate without change the recreation assessment developed by the Secretary pursuant to section 8 of this Act for the special management areas.

(b) LAND USE DESIGNATIONS.—Within two years after the Commission is established, it shall develop land use designations for the use of non-Federal lands within the scenic area. The land use designations shall—

(1) be based on the results of the resource inventory developed pursuant to subsection (a)(1) of this section, and consistent with the standards established in subsection (d) of this section;

(2) designate those lands used or suitable for the production of crops, fruits or other agricultural products or the sustenance of livestock as agricultural lands;

(3) designate lands used or suitable for the production of forest products as forest lands;

(4) designate lands suitable for the protection and enhancement of open spaces;

(5) designate areas in the scenic area outside special management areas used or suitable for commercial development: Provided, That such designation shall encourage, but not require, commercial development to take place in urban areas and shall take into account the physical characteristics of the areas in question and their geographic proximity to transportation, commercial, and industrial facilities and other amenities;

(6) designate areas used or suitable for residential development, taking into account the physical characteristics of the areas in question and their geographic proximity to transportation and commercial facilities and other amenities; and

(7) incorporate without change the designation of urban areas established in section 4(e) of this Act.

(c) ADOPTION OF THE MANAGEMENT PLAN.—Within three years after the date the Commission is established, it shall adopt a management plan for the scenic area. The Commission shall adopt the management plan by a majority vote of the members appointed, including at least three members from each State. The management plan shall—

(1) be based on the results of the resource inventory developed pursuant to subsection (a)(1) of this section;

(2) include land use designations developed pursuant to subsection (b) of this section;

(3) be consistent with the standards established in subsection (d) of this section;

(4) incorporate without change the management direction for the use of Federal lands within and the land use designations for the special management areas adopted by the Secretary pursuant to section 8 of this Act; and

(5) include guidelines for the adoption of land use ordinances for lands within the scenic area. The guidelines—

(A) shall incorporate without change the guidelines for the development of special management area land use ordinances developed by the Secretary pursuant to section 8 of this Act; and

(B) shall not apply to urban areas designated in section 4(e) of this Act.

(d) STANDARDS FOR THE MANAGEMENT PLAN. —The management plan and all land use ordinances and interim guidelines adopted pursuant to this Act shall include provisions to—

(1) protect and enhance agricultural lands for agricultural uses and to allow, but not require, conversion of agricultural lands to open space, recreation development or forest lands;

(2) protect and enhance forest lands for forest uses and to allow, but not require, conversion of forest lands to agricultural lands, recreation development or open spaces;

(3) protect and enhance open spaces;

(4) protect and enhance public and private recreation resources and educational and interpretive facilities and opportunities, in accordance with the recreation assessment adopted pursuant to subsection (a) of this section;

(5) prohibit major development actions in special management areas, except for partitions or short plats which

the Secretary determines are desirable to facilitate land acquisitions pursuant to this Act;

(6) prohibit industrial development in the scenic area outside urban areas;

(7) require that commercial development outside urban areas take place without adversely affecting the scenic, cultural, recreation, or natural resources of the scenic area;

(8) require that residential development outside urban areas take place without adversely affecting the scenic, cultural, recreation, and natural resources of the scenic area; and

(9) require that the exploration, development and productionof mineral resources, and the reclamation of lands thereafter, take place without adversely affecting the scenic, cultural, recreation and natural resources of the scenic area.

(e) AGENCY CONSULTATION AND PUBLIC INVOLVEMENT.—The Secretary and the Commission shall exercise their responsibilities pursuant to this Act in consultation with Federal, State, and local governments having jurisdiction within the scenic area or expertise pertaining to its administration and with Indian tribes. The Secretary and the Commission shall conduct public hearings and solicit public comment prior to final adoption of the management plan and the Commission shall conduct public hearings and solicit public comment prior to final adoption of land use ordinances. The Commission and the appropriate county shall promptly notify the Secretary, the States, local governments and Indian tribes of all proposed major development actions and residential development in the scenic area.

(f) CONCURRENCE OF THE MANAGEMENT PLAN.—

(1) REVIEW BY THE SECRETARY.—Upon adoption of the management plan, the Commission shall promptly submit the plan to the Secretary for review. If the Secretary

agrees with the Commission that the management plan is consistent with the standards established in this section and the purposes of this Act, the Secretary shall concur to that effect. Should the Secretary fail to act on the proposed plan within ninety days, the Secretary shall be deemed to have concurred on the management plan.

(2) DENIAL OF CONCURRENCE.—If concurrence is denied, the Secretary shall state the reasons for finding the plan is inconsistent with the standards established in this section or the purposes of this Act, and shall submit to the Commission suggested modifications to the management plan to make it consistent with such standards and the purposes of this Act.

(3) COMMISSION RECONSIDERATION.—Within one hundred and twenty days after receipt of notification of non-concurrence, the Commission shall—

(A) revise and resubmit the plan to the Secretary; or

(B) by a vote of two-thirds of its membership, including a majority of the members appointed from each State, reject the suggested modifications of the Secretary and adopt a management plan consistent with the provisions of this section and the purposes of this Act.

(g) REVISION OF THE PLAN.—No sooner than five years after adoption of the management plan, put at least every ten years, the Commission shall review the management plan to determine whether it should be revised. The Commission shall submit any revised management plan to the Secretary for review and concurrence, in accordance with the provisions of this section for adoption of the management plan.

(h) AMENDMENT OF THE PLAN.—If the Commission determines at any time that conditions within the scenic area have significantly changed, it may amend the

management plan. The Commission shall submit amendments to the management plan to the Secretary for review, in accordance with the provisions of this section for adoption of the management plan.

SEC. 7. (16 U.S.C. § 544e) ADMINISTRATION OF THE SCENIC AREA.

(a) MANAGEMENT OF THE SCENIC AREA.—The non-Federal lands within the scenic area shall be administered by the Commission in accordance with the management plan and this Act.

(b) ADOPTION OF SCENIC AREA LAND USE ORDINANCES.—

(1) Within sixty days of initial receipt of the management plan, each county shall submit to the Commission a letter stating that it proposes to adopt a land use ordinance consistent with the management plan. If any county fails to submit such letter or fails to adopt a land use ordinance as provided in this section, the Commission shall carry out the requirements of subsection (c) of this section.

(2) Within two hundred and seventy days of receipt of the management plan, each county shall adopt a land use ordinance consistent with the management plan, and thereafter may adopt an amendment, revision or variance to a land use ordinance at any time. Each county upon adoption of a land use ordinance shall promptly submit the ordinance to the Commission.

(3) APPROVAL BY COMMISSION.—(A) Within ninety days after receipt of a land use ordinance, the Commission, by majority vote including at least three members from each State, shall approve the ordinance unless it determines the ordinance is inconsistent with the management plan. Should the Commission fail to act within ninety days, the ordinance shall be deemed to be approved.

(B) If approval is denied, the Commission shall state the reasons for finding the ordinance is inconsistent with the management plan, and shall submit to the county suggested modifications to the ordinance to make it consistent with the management plan.

(C) Each county shall have ninety days after it receives recommendations from the Commission to make modifications designed to eliminate the inconsistencies and to resubmit the ordinance to the Commission for approval. The Commission shall have sixty days to approve or disapprove the resubmitted ordinance. Any resubmitted ordinance shall become effective upon approval. Should the Commission disapprove the resubmitted ordinance, it shall promptly resubmit the ordinance for reconsideration. Should the Commission fail to act within sixty days, the ordinance shall be deemed to be approved.

(c) COMMISSION LAND USE ORDINANCES.—(1) Within ninety days after making a determination that a county has filed to comply with the provisions of this section, the Commission shall make and publish a land use ordinance setting standard for the use of non-Federal lands in such county within the boundaries of the national scenic area, excluding urban areas identified in section 4(e) of this Act. The ordinance shall have the object of assuring that the use of such non-Federal lands is consistent with the management plan. The ordinance may differ amongst the several parcels of land within the boundaries of the scenic area. The ordinance may from time to time be amended by the Commission.

(2) SUBSEQUENT COMPLIANCE.—In the event the Commission has promulgated regulations pursuant to this section, a county may thereafter upon written notice to the Commission elect to adopt a land use ordinance, in which event it shall comply with the provisions of this section for adoption of a land use ordinance. Upon approval of a land

use ordinance by the Commission it shall supersede any regulations for the county developed by the Scommission, subject to valid existing rights.

(d) CONSTRUCTION OF FACILITIES.—The Secretary is hereby authorized to design, construct, operate and maintain such facilities as are included in the recreation assessment.

SEC. 8. (16 U.S.C. § 544f) ADMINISTRATION OF THE SPECIAL MANAGEMENT AREAS.

(a) ADMINISTRATION OF FEDERAL LANDS.—(1) The Secretary shall administer Federal lands within the special management areas in accordance with this Act and other laws, rules and regulations applicable to the national forest system. In addition, the construction of roads and the management, utilization and harvest of timber on Federal lands within the special management areas also shall be subject to Forest Service visual resource management guidelines. The Secretary shall utilize lands acquired through exchange in calculating the allowable sales quantity on the Gifford Pinchot and Mount Hood National Forests.

(b) WITHDRAWAL OF FEDERAL LANDS.—Subject to valid existing rights, all Federal lands located in the special management areas are hereby withdrawn from all forms of entry, appropriation, or disposal under the public land laws, from location, entry, and patent under the mining laws of the United States, and from disposition under all laws pertaining to mineral and geothermal leasing: Provided, That the Secretary may allow the exploration, development, or production of sand, gravel, and crushed rock as necessary to construct, maintain, or reconstruct roads in the special management areas.

(c) RESOURCE INVENTORY.—The Secretary shall complete a resource inventory for the special management areas consistent with the process and substance of the inventory prescribed by section 6(a)(1) of this Act.

(d) RECREATION ASSESSMENT.—Within two years after the date of enactment of this Act, the Secretary shall complete an assessment of recreation resources in the special management areas and opportunities for enhancement of these resources. The recreation assessment shall—

(1) identify areas within the special management areas suitable for designation by the Commission pursuant to section 6 of this Act for the construction of an interpretive center or other appropriate facility, to be located in the State of Oregon, and of a conference center or other appropriate facility, to be located in the State of Washington;

(2) identify areas within the special management areas suitable for other public use facilities, including but not limited to educational and interpretive facilities, campsites, picnic areas, boat launch facilities, and river access areas; and

(3) subject to the treaty or other rights of Indian tribes, identify areas with the special management areas suitable for use to increase access for recreation purposes to the Columbia River and its tributaries.

(e) LAND USE DESIGNATIONS.—Within three years after the date of enactment of this Act, the Secretary shall develop land use designations for the special management areas. The land use designations shall be—

(1) based on the resource inventory prepared by the Secretary pursuant to this section; and

(2) consistent with the standards established in section 6 of this Act.

(f) GUIDELINES FOR LAND USE ORDINANCES.—(1) Within three years after the date of enactment of this Act, the Secretary shall, in consultation with the Commission, develop guidelines to assure that non-Federal lands within the special management areas are managed consistent with the standards in section 6 and the purposes of this Act. The Secretary shall promptly transmit the guidelines to the

Commission for inclusion in the management plan. The guidelines shall require that management, utilization, and disposal of timber, and exploration, development, and production of sand, gravel, and crushed rock for the construction, maintenance, or reconstruction of roads used to manage or harvest forest products on non-Federal lands within the special management areas take place without adversely affecting the scenic, cultural, recreation, and natural resources of the scenic area.

(h) ADOPTION OF SPECIAL MANAGEMENT AREA LAND USE ORDINANCES.—(1) Within sixty days of receipt of the management plan, each county shall submit to the Commission a letter stating that it proposes to adopt a land use ordinance consistent with the management plan. If any county fails to submit a letter as provided in this subsection, or fails to adopt a land use ordinance as provided in this section, the Commission shall carry out the requirements of subsection (1) of this section.

(2) Within two hundred and seventy days of receipt of the management plan, each county shall adopt a special management area land use ordinance consistent with the management plan, and thereafter may adopt an amendment, revision or variance to a land use ordinance at any time. Each county upon adoption of a special management area land use ordinance shall promptly submit the adopted ordinance to the Commission.

(i) REVIEW BY THE COMMISSION.(1) The Commission shall review the special management area land use ordinance received from each county, and within ninety days after receipt shall make a tentative determination as to whether the ordinance is consistent with the management plan. If the Commission makes a tentative determination that the land use ordinance is consistent with the management plan, the Commission shall send the ordinance to the Secretary for concurrence.

(2) If the Commission makes a tentative determination that the land use ordinance is inconsistent with the management plan, the Commission shall state the reasons for the determination and shall return the ordinance to the appropriate county with suggested modifications required for consistency with the management plan.

(3) Each county shall have ninety days after it is notified by the Commission to make modifications designed to eliminate the inconsistencies and to resubmit the ordinance to the Commission for tentative determination of consistency. The Commission shall have sixty days to make a tentative consistency determination on the resubmitted ordinance. If found consistent, the land use ordinance shall be transmitted by the Commission to the Secretary for concurrence that the ordinance is consistent with the management plan. If the Commission finds the resubmitted ordinance inconsistent, the Commission shall adopt an ordinance pursuant to subsection (1) of this section.

(j) CONCURRENCY BY THE SECRETARY.—(1) Upon receipt of a special management area land use ordinance from the Commission, the Secretary shall notify the public of such receipt and shall, within ninety days thereafter, concur with the Commission's tentative determination of consistency with the management plan unless the Secretary determines the ordinance is inconsistent. Any ordinance submitted to the Secretary shall become effective upon notification of concurrence. Should the Secretary fail to act within ninety days, the Secretary shall be deemed to have concurred with the Commission's tentative consistency determination.

(2) DENIAL OF CONCURRENCE.—If concurrence is denied, the Secretary shall state the reasons therefor and shall submit to the Commission suggested modifications to the land use ordinances to make them consistent with the management plan and the purposes of this Act.

(k) COMMISSION RECONSIDERATION.—Upon receipt of notification of nonconcurrence by the Secretary, the Commission shall resubmit the land use ordinance to the appropriate county. Such county shall within ninety days, reconsider and revise the ordinance and resubmit the ordinance to the Commission for reconsideration in accordance with the provisions of this section. Should the Secretary again deny concurrence, the Commission shall either prepare a land use ordinance for such county pursuant to subsection (1) of this section or, by a two-thirds vote of the membership of the Commission including a majority of the members appointed from each State, determine that the ordinance is consistent with the management plan.

(1) COMMISSION ORDINANCES.—(1) Within ninety days after making a determination that a county has failed to comply with the provisions of subsection (h) of this section, the Commission shall make and publish an ordinance setting standards for the use of non-Federal lands of such county within the boundaries of the special management areas. The ordinances shall have the object of assuring that the use of such lands is consistent with the management plan. The ordinances may differ amongst the several parcels of land within the boundaries of the special management areas. The ordinances may from time to time be amended by the Commission.

(2) The Commission shall promptly submit the ordinance to the Secretary. The Secretary shall, within ninety days after receipt of the ordinance from the Commission, concur with the tentative determination that the land use ordinance is consistent with the management plan unless a determination of inconsistence is made. Any ordinance submitted to the Secretary shall become effective upon concurrence. Should the Secretary fail to concur within ninety days, the land use ordinance shall be effective.

(3) If concurrence is denied, the Secretary shall state the reasons for finding the ordinance is inconsistent with the management plan, and shall submit to the Commission suggested modifications to the ordinance to make it consistent with the plan.

(4) The Commission shall have ninety days after it receives recommendations from the Secretary to make modifications designed to eliminate the inconsistencies and to resubmit the ordinance to the Secretaryfor concurrence. The Secretary shall have sixty days to concur with the resubmitted ordinance. Any resubmitted ordinance shall become effective upon concurrence by the Secretary. Should the Secretary deny concurrence for the resubmitted ordinance, the Secretary shall state the reasons therefor and shall promptly resubmit the ordinance for reconsideration. Should the Secretary fail to concur within sixty days, the ordinance shall be deemed effective.

(5) Within one hundred and twenty days after receipt of notification of non- concurrence, the Commission shall—

(A) revise and resubmit the land use ordinance to the Secretary; or

(B) by a vote of two-thirds of its membership, including a majority of the members appointed from each State, reject the suggested modifications of the Secretary and adopt a land use ordinance consistent with the provisions of this section and the purposes of this Act.

(m) SUBSEQUENT COMPLIANCE.—In the event the Commission has adopted an ordinance pursuant to this section, the affected county may thereafter, upon written notice to the Commission and to the Secretary, elect to adopt a special management area land use ordinance, in which event it shall comply with the provisions of this section for adoption of special management area land use ordinances. Upon concurrence of such land use ordinances by the Secretary they

shall supersede any special management area land use ordinances for the county development by the Commission, subject to valid existing rights.

(n) EFFECT OF SECRETARY'S NON-CONCURRENCE.—If the Secretary does not concur in any land use ordinance approved or adopted by the Commission pursuant to this section, the availability of certain funds to the relevant county shall be governed by section 16(c) of this Act.

(o) SPECIAL RULES.—Any ordinance adopted pursuant to this section shall not apply to any parcel or parcels of land within a special management area if, after the date such ordinance has been adopted, three years have elapsed after a landowner has made a bona fide offer to sell at fair market value or otherwise convey such parcel or parcels to the Secretary, unless the affected landowner agrees to an extension of the three year period: Provided, That an offer shall not be considered bona fide if the landowner refuses consideration equal to the fair market value as appraised in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions (Interagency Land Acquisition Conference, 1973). Lands for which an ordinance is suspended pursuant to this subsection shall be subject to the relevant scenic area land use ordinance adopted pursuant to section 7 of this Act.

SEC. 9. (16 U.S.C. § 544g) LAND ACQUISITION

(a) ACQUISITION AUTHORIZED.—(1) The Secretary is authorized to acquire any lands or interests therein within the special management areas and the Dodson/Warrendale Special Purchase Unit which the Secretary determines are needed to achieve the purposes of this Act: Provided, That any lands, waters, or interests therein owned by either State or any political subdivision thereof may be acquired only by donation or exchange.

(2) Lands within the State of Oregon acquired by the Secretary pursuant to this Act shall become part of the MountHood National Forest. Lands within the State of Washington acquired by the Secretary pursuant to this section shall become part of the Gifford Pinchot National Forest. All lands acquired by the Secretary pursuant to this Act shall be subject to the laws and regulations pertaining to the National Forest System and this Act.

(b) LIMITATIONS ON EMINENT DOMAIN.—

(1) Where authorized in subsection (a) of this section to acquire land or interests therein without the consent of the owner, the Secretary shall—

(A) acquire only such land or interests therein as is reasonably necessary to accomplish the purposes of this Act; and

(B) do so only in cases where all reasonable efforts to acquire with the consent of the owner such lands, or interests therein, have failed.

(2) Notwithstanding the provisions of subsection (a) of this section, the Secretary may not acquire without the consent of the owner lands or interests therein which—

(A) on the date of enactment of this Act, were used primarily for educational, religious, or charitable purposes, single-family residential purposes, farming, or grazing so long as the existing character of that use is not substantially changed or permitted for change;

(B) are located in counties with land use ordinances in which the Secretary has concurred pursuant to section 8 of this Act, unless such lands are being used, or are in imminent danger of being used, in a manner incompatible with such ordinances;

(C) are within the boundaries of the Dodson/ Warrendale Special Purchase Unit; or

(D) are owned by an Indian tribe, held in trust by the United States for an Indian tribe or member of an Indian tribe, or otherwise administered by the United States for the benefit of an Indian tribe or member of an Indian tribe.

(c) HARDSHIP CASES.—In exercising authority to acquire lands pursuant to this section the Secretary shall give prompt and careful consideration to any offer made by any person or entity owning any land, or interest in land, within the boundaries of a special management area. In considering such offer, the Secretary shall take into consideration any hardship to the owner which might result from any undue delay in acquiring the property.

(d) LAND EXCHANGES.—(1) The Secretary is authorized and directed, in conformance with the provisions of this subsection, to acquire by exchange any parcel of unimproved forest land at least forty acres in size within the boundaries of the special management areas which is owned by any private forest land owner if, after enactment of this Act but within one hundred and eighty days after final adoption of the management plan, such private forest land owner offers to the United States such parcel of forest land.

(2) In exercising this authority to acquire forest lands pursuant to this subsection, the Secretary may accept title to such lands and convey to the owner federally owned lands deemed appropriate by the Secretary within the States of Oregon and Washington, regardless of the State in which the transferred lands are located. Forest lands exchanged pursuant to this subsection shall be of approximately equal value: Provided, That the Secretary may accept cash from or pay cash to the grantor in such an exchange in order to equalize minor differences in the values of the properties exchanged: Provided further, That the Secretary may reserve in any conveyance pursuant to this subsection such easements, subsurface rights, and any other interests in land deemed

necessary or desirable: Provided further, That the valuation of lands exchanged shall be determined in terms of forest uses for timber.

(3) It is the intention of Congress that land exchanges pursuant to this subsection shall be completed no later than five years after the date of enactment of this Act. No later than sixty days after the enactment of this Act, and every one hundred and eighty days thereafter, the Secretary shall report in writing to the Committee on Energy and Natural Resources of the United States Senate and the Committees on Agriculture and Interior and Insular Affairs of the United States House of Representatives, on the status of negotiations with owners of non-Federal lands to effect the exchanges authorized by this subsection.

(4) In the event that exchanges authorized by this section leave any private forest land owner with ownership of an uneconomic remnant of forest land contiguous to a special management area, the Secretary is authorized to acquire such forest lands as if they were within the boundaries of a special management area.

(5) The following-described Federal lands and interests therein are hereby identified as candidate lands for exchanges conducted pursuant to this section: Provided, That the determination of which candidate lands will be exchanged, and in what sequence, shall be at the discretion of the Secretary. Subject to valid existing rights, such lands are hereby withdrawn from all forms of entry or appropriation or disposal under the public land laws, and from location, entry, and patent under the United States mining law, and from disposition under all laws pertaining to mineral and geothermal leasing and all amendments thereto until the Secretary determines such lands are no longer needed to complete exchanges authorized by this section: Provided, That such period shall not extend beyond five years:

GIFFORD PINCHOT NAT'L FOREST TABLE OMITTED SIUSLAW NATIONAL FOREST TABLE OMITTED WILLAMETTE NATIONAL FOREST TABLE OMITTED MOUNT HOOD NATIONAL FOREST TABLE OMITTED

(e) BOUNDARIES.—For the purposes of section 7 of the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601-9), the boundaries of the scenic area, including special management areas and the Dodson/ Warrendale Special Purchase Unit shall be treated as if they were within the boundaries of the Mount Hood or Gifford Pinchot National Forests as of Janaury 1, 1965.

SEC. 10. (16 U.S.C. § 544h) INTERIM MANAGEMENT.

(a) INTERIM GUIDANCES.—(1) Within one hundred and eighty days after the date of enactment of this Act, the Secretary shall develop interim guidelines for the scenic area outside urban areas to identify land use activities which are inconsistent with this Act and to govern the authority to acquire land without the consent of the owner provided by subsection (b) of this section. The Secretary shall promptly notify the public of adoption of the interim guidelines and transmit the guidelines to each county. Guidelines adopted by the Secretary pursuant to this subsection shall remain in effect for each county until the Secretary has developed guidelines for the special management areas pursuant to section 8 of this Act and the land use ordinances prescribed by section 7 are in effect.

(b) INTERIM ACQUISITION AUTHORITY AND INJUNCTIVE RELIEF.—Prior to the concurrence by the Secretary of land use ordinances prescribed by section 8 of this Act and the approval by the Commission of land use ordinances prescribed by section 7 of this Act, the following authorities are granted:

(1) The Secretary may acquire by condemnation any land or interest which is being used or threatened to be used in a manner inconsistent with the purposes for which the scenic area was established and which will cause or is likely to cause impacts adversely affecting the scenic, cultural, recreation, and natural resources of the scenic area: Provided, That no lands or interests therein can be acquired by condemnation pursuant to this section if used in the same manner and for the same purposes as used on the effective date of this Act, unless such land is used for or interest is in the development of sand, gravel, or crushed rock, or the disposal of refuse: Provided further, That within thirty days of the filing by the Secretary of a complaint for condemnation of any land or interest in the scenic area, outside of the special management areas and urban areas, the Commission, by a vote of two- thirds of its membership including a majority of the members appointed from each State, or if the Commission is not in existence the Governor of the State in which the land or interest is located, may disapprove such proposed complaint.

(2) Upon or after the commencement of any action for condemnation pursuant to this subsection, the Secretary, acting through the Attorney General of the United States, may apply to the appropriate United States District Court for a temporary restraining order or injunction to prohibit the use of any property within the scenic area, but outside of urban areas, which will cause or is likely to cause impacts adversely affecting the scenic, cultural, recreation and natural resources of the scenic area or is otherwise inconsistent with the purposes for which the scenic area was established. During the period of such order or injunction, the Secretary shall diligently and in good faith negotiate with the owner of the property to assure that, following termination of the order or injunction, the inconsistent use is abated or the adverse effect is mitigated.

(c) REVIEW OF DEVELOPMENT ACTION.—Prior to the effective date of a land use ordinance for each county pursuant to section 7 of this Act, and concurrence of the Secretary on a land use ordinance for each county pursuant to section 8 of this Act, the Commission shall review all proposals for major development actions and new residential development in such county in the scenic area, except urban areas. The Commission shall allow major development actions and new residential development only if it determines that such development is consistent with the standards contained in section 6 and the purposes of this Act.

SEC. 11. (16 U.S.C. § 544i) ECONOMIC DEVELOPMENT.

(a) ECONOMIC DEVELOPMENT PLAN.—Based on the Economic Opportunity Study and other appropriate information, each State, in consultation with the counties and the Commission, shall develop a plan for economic development projects for which grants under this section may be used in a manner consistent with this Act.

(b) FUNDS PROVIDED TO STATES FOR GRANTS.—Upon certification of the management plan, and receipt of a plan referred to in subsection (a) of this section, the Secretary shall provide $5,000,000 to each State which each State shall use to make grants and loans for economic development projects that further the purposes of this Act.

(c) CONDITIONS OF GRANTS.—Each State making grants under this section shall require as a condition of a grant that—

(1) all activities undertaken under the grant are certified by the Commission as being consistent with the purposes of the Act, the management plan, and land use ordinances adopted pursuant to this Act;

(2) grants and loans are not used to relocate a business from one community to another;

(3) grants and loans are not used for program administration; and

(4) grants and loans are used only in counties which have in effect land use ordinances found consistent by the Commission and concurred on by the Secretary pursuant to section 8 of this Act.

(d) REPORT.—Each State shall—

(1) prepare and provide the Secretary with an annual report to the Secretary on the use of the funds made available under this section;

(2) make available to the Secretary and to the Commission, upon request, all accounts, financial records, and other information related to grants and loans made available pursuant to this section; and

(3) as loans are repaid, make additional grants and loans with the money made available for obligation by such repayments.

SEC. 12. (16 U.S.C. § 544j) OLD COLUMBIA RIVER HIGHWAY.

The Oregon Department of Transportation shall, in consultation with the Secretary and the Commission, the State of Oregon and the counties and cities in which the Old Columbia River Highway is located, prepare a program and undertake efforts to preserve and restore the continuity and historic integrity of the remaining segments of the Old Columbia River Highway for public use as a Historic Road, including recreation trails to connect intact and usable segments.

SEC. 13. (16 U.S.C. § 544k) TRIBUTARY RIVERS AND STREAMS.

(a) WATER RESOURCES PROJECTS.—The following rivers and streams shall be subject to the same restrictions on the licensing, permitting, and exempting from licensing and the construction of water resource projects as provided for components of the National Wild and Scenic Rivers System pursuant to section 7(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1278(a)):

(1) any tributary river or stream to the Columbia River not designated in subsections (c) or (d) of this section or otherwise specified in this subsection which flows in whole or in part through a special management area, unless the construction of a water resources project would not have a direct and adverse effect on the scenic, cultural, recreation, and natural resources of the scenic area;

(2) any river or river segment which flows in whole or in part through the scenic area and which is established pursuant to State law as a wild, scenic, or recreation river or which is under study pursuant to State law for the potential inclusion in any such State protected river system, unless such project or projects meet terms and conditions set by State agencies exercising administration over such river or river segment;

(3) the Wind River, Washington, for a period not less than three years following the later of—

(A) final approval of the Gifford Pinchot National Forest Plan, adopted pursuant to the National Forest Management Act of 1976 (Act of October 22, 1976, Public Law 94-588, as amended) (16 U.S.C. 1600 et seq.); or

(B) submittal by the Secretary of a report to the President on the suitability or nonsuitability for addition to the national wild and scenic rivers system and a report by the

President to the Congress of recommendations and proposals with respect to the designation of such river under the Wild and Scenic Rivers Act;

(4) the Hood River, Oregon, for a period not to exceed twenty years from the date of enactment of this Act, if such facility impounds or diverts water other than by means of a dam or diversion existing as of date of enactment of this Act; and

(5) the segment of the Little White Salmon, Washington, from the Willard National Fish Hatchery to its confluence with the Columbia River if such facility impounds or diverts water other than by means of a dam or diversion existing as of date of enactment of this Act.

(b) The provisions of subsection (a) shall not apply to those portions of tributary rivers or streams to the Columbia River which flow through or border on Indian reservations. Nothing in this section shall apply to or affect any segment of any river designated as a wild and scenic river under section 3 of the Wild and Scenic Rivers Act (16 U.S.C. 1274) or any river designated for study under section 5 of such Act (16 U.S.C. 1276).

SEC. 14. (16 U.S.C. § 544*l*) IMPLEMENTATION MEASURES.

(a) ASSISTANCE TO COUNTIES.—The Secretary shall provide technical assistance on a nonreimbursable basis to counties for the development of land use ordinances prescribed by sections 7 and 8 of this Act: Provided, That in the event a county fails to obtain approval by the Commission for a land use ordinance within three years after the date technical assistance is first provided under this subsection for the development of a land use ordinance, the Secretary shall terminate all technical assistance for any participation in the development of such ordinance.

(b) PAYMENT OF TIMBER RECEIPTS.—(1) Notwithstanding the provisions of the last paragraph under the heading "Forest Service" of the Act of May 23, 1908 (c. 192, 35 Stat. 251, as amended; 16 U.S.C. 500), and of section 13 of the Act of March 1, 1911 (c. 186, 36 Stat. 961, as amended; 16 U.S.C. 500), that portion of which is paid under such provisions to the State of Oregon with respect to the special management areas within the Mount Hood National Forest, the Gates of the Columbia Gorge Special Management Area, Mount Hood National Forest, and to the State of Washington with respect to the special management areas within the Gifford Pinchot National Forest—

(A) not less than 50 per centum shall be expended for the benefit of the public schools of the county which has adopted implementation measures pursuant to this Act; and

(B) the remainder shall be expended for the benefit of public roads or any public purposes of any county which has adopted implementation measures pursuant to this Act.

(2) Paragraph (1) of this subsection shall not apply—

(A) to any amount paid by the Secretary of the Treasury under the provisions of law referred to in subsection (b)(1) at the end of any fiscal year ending before the date of enactment of this Act; or

(B) for a particular county, if the county does not have in effect a land use ordinance which has been found consistent by the Commission and concurred on by the Secretary pursuant to section 8 of this Act.

(c) PAYMENTS TO LOCAL GOVERNMENTS.—(1) Subject to section 16(b) of this Act, in the case of any land or interest therein acquired by the Secretary pursuant to section 9, which was subject to local real property taxes within the five years preceding such acquisition and which is located in a county which has in effect a land use ordinance which has

been found consistent by the Commission and concurred on by the Secretary pursuant to section 8, the Secretary is authorized and directed to make annual payments to the county in which such lands are located in an amount equal to 1 percentum of the fair market value of such land or interest therein on the date of acquisition by the Secretary.

(2) Notwithstanding paragraph (1) of this subsection, any payment made for any fiscal year to a county pursuant to this subsection shall not exceed the amount of real property taxes assessed and levied on such property during the last full fiscal year before the fiscal year in which such land or interest therein was acquired by the Secretary.

(3) No payment shall be made under this subsection with respect to any land or interest therein after the fifth full fiscal year beginning after the first fiscal year in which such a payment was made with respect to such land or interest therein.

(d) FEDERAL CONSISTENCY.—Except as otherwise provided in subsection (e) or in section 17 of this Act, Federal agencies having responsibilities within the scenic area shall exercise such responsibilities consistent with the provisions of this Act as determined by the Secretary.

(e) LIMITATIONS ON FEDERAL EXPENDITURES AFFECTING THE SCENIC AREA.—(1) Except as provided in paragraph (3), if the Commission has not been established pursuant to section 5 within fifteen months after the date of enactment of this Act, or is otherwise disestablished for any reason, no new expenditures or new financialassistance may be made available, and no new license or new permit, or exemption from a license or permit requirement, shall be issued, under authority of any Federal law for any activity within the scenic area, excluding urban areas, which the Secretary, determines is inconsistent with any implementation measure pursuant to, the standards established in section 6(b) of, or the purposes of this Act.

(2)(A)(i) An expenditure or financial assistance made available under authority of Federal law shall be treated, for purposes of this subsection, as a new expenditure or new financial assistance if—

(I) in any case with respect to which specific appropriations are required, no money for construction or purchase was appropriated before October 1, 1986; or

(II) no legally binding commitment for the expenditure or financial assistance was made before October 1, 1986.

(ii) Payments made to the State pursuant to the following Acts shall not be treated as an expenditure or financial assistance for purposes of this subsection: the Act of May 23, 1908, (c. 192, 35 Stat. 251; 16 U.S.C. 500); section 13 of the Act of March 1, 1911 (c. 186, 36 Stat. 961; 16 U.S.C. 500); the Mineral Lands Leasing Act of 1920; chapter 69 of title 31 (relating to payments in lieu of taxes for entitlement land); the Act of June 9, 1916 (39 Stat. 218), and the Act of Feb. 26, 1919 (40 Stat. 1179).

(B) A license or permit, or exemption from a license or permit requirement, shall be treated, for purposes of this subsection, as a new license or new permit, or exemption from a license or permit requirement, if such license or permit, or exemption from a license or permit requirement, was issued on or after October 1, 1986. A renewal under similar terms and conditions of a license or permit, or exemption from a license or permit requirement, issued before October 1, 1986, shall not be treated as a new license or new permit, or exemption from a license or permit requirement.

(3) Notwithstanding paragraph (1), the appropriate Federal officer, after consultation with the Secretary, may make Federal expenditures or financial assistance available within the area for any of the following:

(A) The maintenance of existing channel improvements and related structures, and including the disposal of dredge materials related to such improvements.

(B) The maintenance, replacement, reconstruction, or repair, but not the expansion, of publicly owned or publicly operated roads, structures, or facilities that are essential links in a larger network or system.

(C) Military activities essential to national security.

(D) Any of the following actions or projects, but only if the making available of expenditures or assistance therefor is consistent with the standards in section 6(b) and the purposes of this Act:

(i) Projects for the study, management, protection and enhancement of fish and wildlife resources and habitats, including, but not limited to, acquisition of fish and wildlife habitats and related lands, stabilization projects for fish and wildlife habitats, and recreational projects.

(ii) The establishment, operation, and maintenance of air and water navigation aids and devices, and for access thereto.

(iii) Projects under the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601-4 through 11) and the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(iv) Scientific research, including but not limited to aeronautical, atmospheric, space, geologic, marine, fish and wildlife, and other research, development, and applications.

(v) Assistance for emergency actions essential to the saving of lives and the protection of property and the public health and safety, if such actions are performed pursuant to sections 305 and 306 of the Disaster Relief Act of 1974 (42 U.S.C. 5145 and 5146) and section 1362 of the

National Flood Insurance Act of 1968 (42 U.S.C. 4103) and are limited to actions that are necessary to alleviate the emergency.

(vi) The maintenance, replacement, reconstruction, or repair, but not the expansion, of publicly owned or publicly operated roads, structures, or facilities. This clause shall not apply to roads, structures, or facilities referred to in paragraph (3)(B).

(vii) Nonstructural projects for shoreline stabilization that are designed to mimic, enhance, or restore natural stabilization systems.

(4) The Director of the Office of Management and Budget shall, on behalf of each Federal agency concerned, make written certification that each such agency has complied with the provision of this subsection during each fiscal year beginning after September 30, 1987. Such certification shall be submitted on an annual basis to the House of Representatives and the Senate pursuant to the schedule required under the Congressional Budget and Impoundment Control Act of 1974.

(5) Nothing contained in this subsection shall be construed as indicating an intent on the part of the Congress to change the existing relationship of other Federal laws to the law of a State, or a political subdivision of a State, or to relieve any person or any obligation imposed by any law of any State, or political subdivision of a State. No provision of this subsection shall be construed to invalidate any provision of State or local law unless there is a direct conflict between such provision and the law of the State, or political subdivision of the State, so that the two cannot be reconciled or consistently stand together. This subsection shall in no way be interpreted to interfere with a State's right to protect, rehabilitate, preserve, and restore lands within its established boundary.

(f) TRANSFER OF PUBLIC LANDS.—Subject to valid existing rights, all public lands within the scenic area administered by the Secretary of the Interior through the Bureau of Land Management are hereby transferred without consideration to the jurisdiction of the Secretary to be managed as National Forest lands in accordance with the provisions of this Act.

SEC. 15. (16 U.S.C. § 544m) ENFORCEMENT.

(a) ADMINISTRATIVE REMEDIES.—

(1) COMMISSION ORDERS.—The Commission shall monitor activities of counties pursuant to this Act and shall take such actions as it determines are necessary to ensure compliance.

(2) APPEAL TO THE COMMISSION.—Any person or entity adversely affected by any final action or order of a county relating to the implementation of this Act may appeal such action or order to the Commission by filing with the Commission within thirty days of such action or order, a written petition requesting that such action or order be modified, terminated, or set aside.

(3) CIVIL PENALTIES.—Any person or entity who willfully violates the management plan or any land use ordinance or any implementation measure or any order issued by the Commission pursuant to this Act may be assessed a civil penalty by the Commission not to exceed $10,000 for each violation. No penalty may be assessed under this subsection unless such person or entity is given notice and opportunity for a public hearing with respect to such violation. The Commission may compromise, modify, or remit, with or without conditions, any penalty imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the violator to remedy the violation in a timely manner.

(b) JUDICIAL REMEDIES.—

(1) CIVIL ACTIONS TO ENFORCE ACT.—(A) Except as otherwise limited by this Act, the Attorney General of the United States may, at the request of the Secretary, institute a civil action for an injunction or other appropriate order to prevent any person or entity from utilizing lands within the special management areas in violation of the provisions of this Act, interim guideline adopted or other action taken by the Secretary pursuant to this Act.

(B) The Commission, or, at the request of the Commission, or the attorney general of Oregon or Washington, may institute a civil action for an injunction or other appropriate order to prevent any person or entity from utilizing lands within the scenic area outside urban areas in violation of the provisions of this Act, the management plan, or any land use ordinance or interim guideline adopted or other action taken by the Commission or any county pursuant to this Act.

(2) CITIZENS SUITS.—Any person or entity adversely affected may commence a civil action to compel compliance with this Act—

(A) against the Secretary, the Commission or any county where there is alleged a violation of the provisions of this Act, the management plan or any land use ordinance or interim guideline adopted or other action taken by the Secretary, the Commission, or any county pursuant to or Commission under this Act; or

(B) against the Secretary, the Commission, or any county where there is alleged a failure of the Secretary, the Commission or any county to perform any act or duty under this Act which is not discretionary with the Secretary, the Commission or any county.

(3) LIMITATION ON BRINGING OF CITIZENS SUITS.—No action may be commenced—

(A) under paragraph (2)(A) of this subsection—

(i) prior to sixty days after the plaintiff has given notice in writing of the alleged violation to the Secretary, to the Commission, and to the county in which the violation is alleged to have occurred; or

(ii) if the Attorney General of the United States, or the attorney general of Oregon or Washington, has commenced and is diligently prosecuting a civil action on the same matter pursuant to paragraph (1) of this subsection to require compliance with the management plan or any regulations, guidelines, or standards issued or other actions taken by the Secretary, the Commission, or any county pursuant to this Act: Provided, That in any such action any person or entity otherwise entitled to bring an action pursuant to paragraph (2) of this subsection may intervene as a matter of right; or

(iii) which challenges the consistency of the draft management plan with the purposes and standards of this Act or with other applicable law prior to the certification or adoption of the Management Plan pursuant to section 6 of this Act; or

(B) under paragraph (2)(B) of this subsection prior to sixty days after the plaintiff has given notice in writing of such action to the Secretary, the Commission, and to the county in which the failure to perform any act or duty pursuant to this Act is alleged: Provided, That such action may be brought immediately after such notification where the violation or order complained of constitutes an an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff.

(4) JUDICIAL REVIEW.—Any person or entity adversely affected by—

(A) any final action or order of a county, the Commission, or the Secretary relating to the implementation of this Act;

(B) any land use ordinance or interim guideline adopted pursuant to this Act;

(C) any appeal to the Commission pursuant to this section;

(D) any civil penalty assessed by the Commission pursuant to paragraph (a)(3) of this subsection may appeal such action or order by filing in any of the courts specified in paragraph (5) of this subsection, within sixty days after such action is taken, a written petition requesting such action, order, land use ordinance, interim guideline, or appeal taken to the Commission be modified terminated, or set aside.

(5) FEDERAL COURT JURISDICTION.—The United States district courts located in the States of Oregon and Washington shall have jurisdiction over—

(A) any criminal penalty imposed pursuant to 16 U.S.C. 551, or any other applicable law for violation of any order, regulation or other action taken by the Secretary pursuant to this Act;

(B) any civil action brought against the Secretary pursuant to this section; or

(C) any appeal of any order, regulation, or other action of the Secretary taken pursuant to paragraph (4) of this subsection.

(6) STATE COURT JURISDICTION. -- The State courts of the States of Oregon and Washington shall have jurisdiction—

(A) to review any appeals taken to the Commission pursuant to subsection (a)(2) of this section;

(B) over any civil action brought by the Commission pursuant to subsection (b)(1) of this section or against the Commission, a State, or a county pursuant to subsection (b)(2) of this section;

(C) over any appeal of any order, 9egulation, or other action of the Commission or a county taken pursuant to paragraph 4 of this subsection; or

(D) any civil penalties assessed by the Commission pursuant to subsection (a)(3) of this section.

SEC. 16. (16 U.S.C. § 544n) AUTHORIZATION OF APPROPRIATIONS.

(a) AUTHORIZATIONS.—There are authorized to be appropriated for fiscal years after the fiscal year 1986 such sums as are described below;

(1) For the purpose of acquisition of lands, water and interests therein pursuant to this Act: $40,000,000: Provided, That of this amount no more than $10,000,000 shall be available to acquire lands, water, and interests therein pursuant to section 10. Such amounts are authorized to be appropriated from amounts covered into the Land and Water Conservation Fund notwithstanding any allocation, apportionment, or limitation contained in the Land and Water Conservation Fund (16 U.S.C. 4601-4 and following).

(2) For the purpose of providing payments to local governments pursuant to section 14(c): $2,000,000.

(b) There are authorized to be appropriated for fiscal years after the fiscal year 1986, ettective upon concurrence on the management plan pursuant to section 6 of this Act:

(1) For the purpose of construction of an interpretive center to be located in the State of Oregon, and a conference center to be located in the State of Washington: $10,000,000.

(2) For the purpose of construction of recreation facilities pursuant to section 7(d): $10,000,000.

(3) For the purpose of preparing a program and restoring and reconstructing the Old Columbia River Scenic Highway, Oregon pursuant to section 12 of this Act: $2,800,000.

(4) For the purpose of providing economic development grants pursuant to section 11: $5,000,000 for each State: Provided, That funds authorized to be appropriated pursuant to this paragraph shall be available for the acquisition of lands and interest therein pursuant to section 10 if, at the expiration of three years, the States have failed to carry out their respective function pursuant to section 5 of this Act.

(c) AVAILABILITY OF FUNDS.—Funds appropriated under subsections (a)(2) and (b) shall not be made available for any county which does not have in effect a land use ordinance which has been found to be consistent by the Commission, and concurred on by the Secretary as consistent with the management plan pursuant to section 8 of this Act.

SEC. 17. (16 U.S.C. § 544o) SAVINGS PROVISIONS.

(a) Nothing in this Act shall—

(1) affect or modify any treaty or other rights of any Indian tribe;

(2) except as provided in section 13(c), authorize the appropriation or use of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual;

(3) except as provided in section 13(c), affect the rights or jurisdictions of the United States, the States, Indian tribes or other entities over waters of any river or stream or over any ground water resource or affect or interfere with transportation activities on any such river or stream;

(4) except as provided in section 13(c), alter, establish, or affect the respective rights of the United States, the States, Indian tribes, or any person with respect to any water or water-related right;

(5) alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by the States before the enactment of this Act;

(6) affect or modify the ability of the Bonneville Power Administration to operate, maintain, and modify existing transmission facilities;

(7) affect lands held in trust by the Secretary of the Interior for Indian tribes or individual members of Indian tribes or other lands acquired by the Army Corps of Engineers and administered by the Secretary of the Interior for the benefit of Indian tribes and individual members of Indian tribes;

(8) affect the laws, rules and regulations pertaining to hunting and fishing under existing State and Federal laws and Indian treaties;

(9) require any revision or amendment of any forest plan adopted pursuant to the National Forest Management Act of 1976 (Act of October 22, 1976, Public Law 94-588, as amended (16 U.S. C. 1600 et seq.)); or

(10) establish protective perimeters or buffer zones around the scenic area or each special management area. The fact that activities or uses inconsistent with the management directives for the scenic area or special management areas can be seen or heard from these areas shall not, of itself, preclude such activities or uses up to the boundaries of the scenic area or special management areas.

(b) Except for the offsite disposal of excavation material, nothing in this Act shall be construed to affect or modify the responsibility of the United States Army Corps of Engineers to improve navigation facilities at Bonneville Dam pursuant to Federal law.

(c) Except for the management, utilization, or disposal of timber resources of non-Federal lands within the special management areas, nothing in this Act shall affect the rights

and responsibilities of non-Federal timber land owners under the Oregon and Washington Forest Practices Acts or any county regulations which under applicable State law supersede such Acts.

(d) Mandatory language in this Act respecting the powers and responsibilities of the Commission shall be interpreted as conditions precedent to congressional consent to the interstate compact described in section 5 of this Act.

(e) In the event that the States of Washington and Oregon fail to comply with the provisions of section 5 of this Act, the Secretary shall not be obligated to take actions which are predicated upon the establishment of the Commission.

(f)(1) Actions by the Secretary pursuant to subsections (f), (g), and (h) of section 6; subsections (f), (j), (k), and (1) of section 8; section 9; and subsections (a) and (b)(2) of section 10 shall neither be considered major Federal actions significantly affecting the quality of the environment under section 102 of the National Environmental Policy Act (42 U.S.C. 4332) nor require the preparation of an environmental assessment in accordance with that Act.

(2) Except as provided in paragraph (1) of this subsection, nothing in this Act shall expand, restrict, or otherwise alter the duties of the Secretary under the National Environmental Policy Act.

SEC. 18. (16 U.S.C. § 544p) SEVERABILITY.

(a) If any provision of this Act or the application thereof to any person, State, Indian tribe, entity, or circumstance is held invalid, neither the remainder of this Act, nor the application of any provisions herein to other persons, States, Indian tribes, entities, or circumstances, shall be affected thereby.

APPENDIX G

RCW 43.97.015
Columbia River Gorge Compact—Columbia River Gorge commission.

The legislature of the State of Washington hereby ratifies the Columbia River Gorge Compact set forth below, and the provisions of such compact hereby are declared to be the law of this state upon such compact becoming effective as provided in Article III.

A compact is entered into by and between the states of Washington and Oregon, signatories hereto, with the consent of the Congress of the United States of America, granted by an Act entitled, "The Columbia River Gorge National Scenic Area Act," P.L. 99-663.

ARTICLE I

COLUMBIA GORGE COMMISSION ESTABLISHED

a. The States of Oregon and Washington establish by way of this interstate compact a regional agency known as the Columbia River Gorge Commission. The commission established in accordance with this compact shall have the power and authority to perform all functions and responsibilities in accordance with the provisions of this compact and of the Columbia River Gorge National Scenic Area Act (the federal Act), which is incorporated by this specific reference in this agreement. The commission's powers shall include, but not be limited to:

1. The power to sue and be sued.

2. The power to disapprove a land use ordinance enacted by a county if the ordinance is inconsistent with the management plan, as provided in P.L. 96-663 [sic], Sec. 7(b)(3)(B).

3. The power to enact a land use ordinance setting standards for the use of nonfederal land in a county within the scenic area if the county fails to enact land use ordinances consistent with the management plan, as provided in P.L. 99-663, Sec. 7(c).

4. According to the provisions of P.L. 99-663, Sec. 10(c), the power to review all proposals for major development action and new residential development in each county in the scenic area, except urban areas, and the power to disapprove such development if the commission finds the development is inconsistent with the purposes of P.L. 99-663.

b. The commission shall appoint and remove or discharge such personnel as may be necessary for the performance of the commission's functions, irrespective of the civil service, personnel or other merit system laws of any of the party states.

c. The commission may establish and maintain, independently or in conjunction with any one or more of the party states, a suitable retirement system for its full-time employees. Employees of the commission shall be eligible for social security coverage in respect of old age and survivors insurance provided that the commission takes such steps as may be necessary pursuant to federal law to participate in such program of insurance as a governmental agency or unit. The commission may establish and maintain or participate in such additional programs of employee benefits as may be appropriate.

d. The commission shall obtain the services of such professional, technical, clerical and other personnel as may be deemed necessary to enable it to carry out its functions under this compact. The commission may borrow, accept, or contract for the services of personnel from any state of the United States or any subdivision or agency thereof, from any

interstate agency, or from any institution, person, firm or corporation.

e. Funds necessary to fulfill the powers and duties imposed upon and entrusted to the commission shall be provided as appropriated by the legislatures of the states in accordance with Article IV. The commission may also receive gifts, grants, endowments and other funds from public or private sources as may be made from time to time, in trust or otherwise, for the use and benefit of the purposes of the commission and expend the same or any income therefrom according to the terms of the gifts, grants, endowments or other funds.

f. The commission may establish and maintain such facilities as may be necessary for the transacting of its business. The commission may acquire, hold and convey real and personal property and any interest therein.

g. The commission shall adopt bylaws, rules, and regulations for the conduct of its business, and shall have the power to amend and rescind these bylaws, rules and regulations. The commission shall publish its bylaws, rules and regulations in convenient form and shall file a copy thereof and of any amendment thereto, with the appropriate agency or officer in each of the party states.

ARTICLE II

THE COMMISSION MEMBERSHIP

a. The commission shall be made up of twelve voting members appointed by the states, as set forth herein, and one non-voting member appointed by the U.S. Secretary of Agriculture.

b. Each state governor shall appoint the members of the commission as provided in the federal Act (three members who reside in the State of Oregon, including one resident of the scenic area, to be appointed by the Governor of Oregon,

and three members who reside in the State of Washington, including one resident of the scenic area, appointed by the Governor of Washington).

c. One additional member shall be appointed by the governing body of each of the respective counties of Clark, Klickitat, and Skamania in Washington, and Hood River, Multnomah, and Wasco in Oregon, provided that in the event the governing body of a county fails to make such an appointment, the Governor of the state in which the county is located shall appoint such a member.

d. The terms of the members and procedure for filling vacancies shall all be as set forth in the federal Act.

ARTICLE III

EFFECTIVE DATE OF COMPACT AND COMMISSION

This compact shall take effect, and the commission may exercise its authorities pursuant to the compact and pursuant to the Columbia River Gorge National Scenic Area Act when it has been ratified by both states and upon the appointment of four initial members from each state. The date of this compact shall be the date of the establishment of the commission.

ARTICLE IV
FUNDING

a. The States of Washington and Oregon hereby agree to provide by separate agreement or statute of each state for funding necessary to effectuate the commission, including the establishment of compensation or expenses of commission members from each state which shall be paid by the state of origin.

b. The commission shall submit to the Governor or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required

by the laws of that jurisdiction for presentation to the legislature thereof.

c. Subject to appropriation by their respective legislatures, the commission shall be provided with such funds by each of the party states as are necessary to provide the means of establishing and maintaining facilities, a staff of personnel, and such activities as may be necessary to fulfill the powers and duties imposed upon and entrusted to the commission.

d. The commission's proposed budget and expenditures shall be apportioned equally between the states.

e. The commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the commission shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the commission shall be audited yearly by the appropriate state auditing official and the report of the audit shall be included in and become a part of the annual report of the commission.

f. The accounts of the commission shall be open at any reasonable time for inspection by the public.

ARTICLE V

SEVERABILITY

If any provision of this compact, or its application to any person or circumstance, is held to be invalid, all other provisions of this compact, and the application of all of its provisions to all other persons and circumstances, shall remain valid, and to this end the provisions of this compact are severable.

ORS 196.150
Columbia River Gorge Compact

The Legislative Assembly of the State of Oregon hereby ratifies the Columbia River Gorge Compact set forth below, and the provisions of such compact hereby are declared to be the law of this state upon such compact becoming effective as provided in Article III.

A compact is entered into by and between the states of Washington and Oregon, signatories hereto, with the consent of the Congress of the United States of America, granted by an Act entitled, "The Columbia River Gorge National Scenic Area Act," P.L. 99-663.

ARTICLE I
Columbia Gorge Commission Established

a. The States of Oregon and Washington establish by way of this interstate compact a regional agency known as the Columbia River Gorge Commission. The commission established in accordance with this compact shall have the power and authority to perform all functions and responsibilities in accordance with the provisions of this compact and of the Columbia River Gorge National Scenic Area Act (the federal Act), which is incorporated by this specific reference in this agreement. The commission's powers shall include but not be limited to:

1. The power to sue and be sued.

2. The power to disapprove a land use ordinance enacted by a county if the ordinance is inconsistent with the management plan, as provided in P.L. 96- 663 § 7(b)(3)(B).

3. The power to enact a land use ordinance setting standards for the use of nonfederal land in a county within the scenic area if the county fails to enact land use ordinances consistent with the management plan, as provided in P.L. 96-663 [sic] s.7(b)(3)(B).

4. According to the provisions of P.L. 99-663 s. 10(c), the power to review all proposals for major development action and new residential development in each county in the scenic area, except urban areas, and the power to disapprove such development if the commission finds the development is inconsistent with the purposes of P.L. 99-663.

b. The commission shall appoint and remove or discharge such personnel as may be necessary for the performance of the commission's functions, irrespective of the civil service, personnel or other merit system laws of any of the party states.

c. The commission may establish and maintain, independently or in conjunction with any one or more of the party states, a suitable retirement system for its full-time employees. Employees of the commission shall be eligible for social security coverage in respect of old age and survivors insurance provided that the commission takes such steps as may be necessary pursuant to federal law to participate in such program of insurance as a governmental agency or unit. The commission may establish and maintain or participate in such additional programs of employee benefits as may be appropriate.

d. The commission shall obtain the services of such professional, technical, clerical and other personnel as may be deemed necessary to enable it to carry out its functions under this compact. The commission may borrow, accept, or contract for the services of personnel from any state of the United States or any subdivision or agency thereof, from any interstate agency, or from any institution, person, firm or corporation.

e. Funds necessary to fulfill the powers and duties imposed upon and entrusted to the commission shall be provided as appropriated by the legislatures of the states in accordance with Article IV. The commission may also

receive gifts, grants, endowments and other funds from public or private sources as may be made from time to time, in trust or otherwise, for the use and benefit of the purposes of the commission and expend the same or any income therefrom according to the terms of the gifts, grants, endowments or other funds.

f. The commission may establish and maintain such facilities as may be necessary for the transacting of its business. The commission may acquire, hold and convey real and personal property and any interest therein.

g. The commission shall adopt bylaws, rules, and regulations for the conduct of its business, and shall have the power to amend and rescind these bylaws, rules and regulations. The commission shall publish its bylaws, rules and regulations in convenient form and shall file a copy thereof and of any amendment thereto, with the appropriate agency or officer in each of the party states.

ARTICLE II
The Commission Membership

a. The commission shall be made up of twelve voting members appointed by the states, as set forth herein, and one non-voting member appointed by the U.S. Secretary of Agriculture.

b. Each state governor shall appoint the members of the commission as provided in the federal Act (three members who reside in the State of Oregon, including one resident of the scenic area, to be appointed by the Governor of Oregon, and three members who reside in the State of Washington, including one resident of the scenic area, appointed by the Governor of Washington).

c. One additional member shall be appointed by the governing body of each of the respective counties of Clark, Klickitat, and Skamania in Washington, and Hood River,

Multnomah, and Wasco in Oregon, provided that in the event the governing body of a county fails to make such an appointment, the Governor of the state in which the county is located shall appoint such a member.

d. The terms of the members and procedure for filling vacancies shall all be as set forth in the federal Act.

ARTICLE III
Effective Date of Compact and Commission

This compact shall take effect, and the commission may exercise its authorities pursuant to the compact and pursuant to the Columbia River Gorge National Scenic Area Act when it has been ratified by both states and upon the appointment of four initial members from each state. The date of this compact shall be the date of the establishment of the commission.

ARTICLE IV
Funding

a. The States of Washington and Oregon hereby agree to provide by separate agreement or statute of each state for funding necessary to effectuate the commission, including the establishment of compensation or expenses of commission members from each state which shall be paid by the state of origin.

b. The commission shall submit to the Governor or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that jurisdiction for presentation to the legislature thereof.

c. Subject to appropriation by their respective legislatures, the commission shall be provided with such funds by each of the party states as are necessary to provide the means of establishing and maintaining facilities, a staff of personnel, and such activities as may be necessary to fulfill

the powers and duties imposed upon and entrusted to the commission.

d. The commission's proposed budget and expenditures shall be apportioned equally between the states.

e. The commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the commission shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the commission shall be audited yearly by the appropriate state auditing official and the report of the audit shall be included in and become a part of the annual report of the commission.

f. The accounts of the commission shall be open at any reasonable time for inspection by the public.

ARTICLE V

Severability

If any provision of this compact, or its application to any person or circumstance, is held to be invalid, all other provisions of this compact, and the application of all of its provisions to all other persons and circumstances, shall remain valid, and to this end the provisions of this compact are severable.

Supreme Court, U.S.
FILED
MAR 1 2002
CLERK

No. 01-958

IN THE

Supreme Court of the United States

CHRIS WOODALL and
COLUMBIA RIVER GORGE COMMISSION,

Petitioners,

v.

SKAMANIA COUNTY, WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON DIVISION 2

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When a compact agency requires by administrative rule that state law will determine whether a land use has a vested right to continue, does a court err when it applies the state's law on vested rights to a land use dispute in the geographic area covered by the compact?

2. When a compact agency's enabling legislation provides for judicial review of the agency's decisions by state courts, must a reviewing state court defer to a compact agency decision which contradicts the plain meaning of the compact agency's own rules?

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STATEMENT OF THE CASE

The Columbia River Gorge stretches east from the metropolitan area of Portland, Oregon, and slices through the Cascade Mountain Range for approximately 70 miles. The river encased by the Columbia River Gorge is the Oregon/Washington border for the Columbia River Gorge's entire length.

The beauty of the Columbia River Gorge is undeniable and is a primary reason that Congress, Oregon, and Washington agreed to establish the Columbia River Gorge National Scenic Area and the Columbia River Gorge Compact ("compact"). The compact included creation of a bi-state agency called the Columbia River Gorge Commission ("Gorge Commission"). The two states and Congress vested in the Gorge Commission responsibility for preparing a comprehensive blueprint to govern land use in the Columbia River Gorge National Scenic Area.

The land use blueprint developed by the Gorge Commission is The Management Plan for the Columbia River Gorge National Scenic Area ("Management Plan"). Except for the few specifics set out in statute and some minor differences found in county ordinances through which the Scenic Area is directly administered, the Management Plan includes all the normative land use rules for development within the Columbia River Gorge National Scenic Area. The dictates of the Management Plan are universally relied upon by landowners and land use practitioners in the Columbia River Gorge National Scenic Area. The Management Plan also is important to the governments of the six counties whose land geographically makes up the Columbia River Gorge National Scenic Area. By virtue of

the compact legislation, each of these six counties had the option to adopt a land use ordinance to implement the Columbia River Gorge National Scenic Area Act ("Gorge Act"). 16 U.S.C. § 544, *et seq*. These ordinances, however, had to be approved by the Gorge Commission as being consistent with the Management Plan. 16 U.S.C. § 544e.

This case arises out of Skamania County's administration of its Scenic Area land use ordinance ("Scenic Ordinance") which, consistent with 16 U.S.C. § 544e, the Gorge Commission approved. The specific legal provision in dispute, applied by Skamania County from its Scenic Area Ordinance, closely tracks a parallel provision in the Management Plan. Pet. App. at 4a-5a.

Skamania County applied the provision at issue to a landowner who sought permission to continue to operate a ten-site mobile home park. AR at 206-15. The park at one time had ten mobile homes. Currently, the park consists of three mobile homes and seven unoccupied concrete pads. AR 11, 17-19. Skamania County specifically found the owner's nonconforming use as a ten-site park remained a vested right that could continue. The basis for this decision was Skamania County's application of Washington state law as directed by the Management Plan. Pet. App. at 36a-41a; AR 11, 17-19.

On review, the Gorge Commission and a Washington state court of general jurisdiction, both sitting in their appellate capacity, found Skamania County's decision to be in error. *Skamania County v. Woodall ("Woodall")*, 104 Wn. App. 525, 16 P.3d 701, *review denied en banc*, 144 Wn.2d 1021, 34 P.3d 1232 (2001); Pet. App. 18a-35a. The Washington Court of Appeals reversed, finding Skamania

County's action consistent with the Management Plan, Skamania County's Scenic Ordinance, and Washington's common law on vested rights. *Id.*

Respondent takes exception with petitioner's Statement of the Case at page 12 of the Petition where the petitioner contends that the Washington Court of Appeals reasoned that the discontinued standard at issue is a question of vesting even though "no party ever argued that the issue in the case raised a question of vesting." Pet. at 12. Respondent believes petitioner mischaracterized the Washington Court of Appeals' holding and the arguments the parties advanced below.[1]

REASONS FOR DENYING THE WRIT

Accepting petitioners' invitation for review would send several wrong messages to the Columbia River Gorge Commission.

First, the Gorge Commission should be encouraged to clearly articulate the land use rules it promulgated through the Management Plan. Additional judicial review will do nothing to encourage this needed clarity.

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1. Respondent raises this mischaracterization pursuant to its obligation under Sup. Ct. R. 15(2). Petitioners are wrong in writing "the Court reasoned that because the 'discontinued' standard at issue is a question of vesting under Washington law . . ." By making this statement, petitioners confuse the Washington Court of Appeals' actual holding, which was based on (1) the recognition that Washington's law of vested rights includes the legal right of non-conforming uses to continue, and (2) the Court's recognition that the Washington law of vested rights is broader than Washington's vested rights doctrine. Pet. App. 11a-15a.

Second, accepting review only will encourage the Gorge Commission to seek Supreme Court review whenever it disagrees with a state court which has exercised meaningful judicial review over a Gorge Commission appellate decision. Such review is more appropriate when the compact language itself is at issue rather than the terms of the Management Plan. Clearly, the Gorge Commission has the authority to change the Management Plan term if it finds the term offensive to its mission under the compact.

Third, accepting petitioners' invitation will encourage the recent propensity of the Gorge Commission to dispense with the rule of law in the name of protecting the Columbia River Gorge National Scenic Area. *See, e.g., Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 26 P.3d 241 (2001).

Fourth, petitioners argue the nation's body of compact law is confused by conflicting doctrines and urges this Court to use this case as a vehicle for bringing clarity to compact law. If such a need genuinely exists, the Court can do much better than a set of facts where a compact agency effectively is urging the Court to sanction the agency's disregard for the plain language meaning of its own rules.

Fifth, petitioners' allegation of local judicial bias is without empirical and historical foundation. A review of state case law involving the Columbia River Gorge Commission demonstrates considerable respect and deference to the Gorge Commission.

Lastly, petitioners greatly exaggerate the effect the Washington Court of Appeals decision will have on future management of the Columbia River Gorge National Scenic Area.

I. The Better Approach is for the Gorge Commission to Exercise its Institutional Competence Rather than for the Supreme Court to Intervene

Petitioners apparently believe that when an interstate compact agency implements its compact through promulgation of rules, but then determines the plain language of these rules is contrary to what it actually believes are the compact's object and purpose, the compact agency should seek review by the United States Supreme Court rather than rewrite its rules.

Clearly, when a compact agency possesses the authority to achieve through rulemaking what it is seeking from the Supreme Court, the correct approach is for the agency to use the institutional competence vested in it by Congress and the legislatures of the compacting states. This view is grounded in basic tenants of administrative law which include the doctrine of primary jurisdiction and the requirement that agencies must follow their own rules.

To provide protection for the Scenic Area, Congress, Oregon, and Washington provided the Gorge Commission with broadly defined standards and directed the Gorge Commission to implement these standards through preparing a detailed management plan for Scenic Area land use. 16 U.S.C. § 544 (see entire Act for broad standards and § 544d for Management Plan mandate); Wash. Rev. Code § 43.97.015; Or. Rev. Stat. § 196.150. The Gorge Act specifically directed the Gorge Commission to regularly revise or amend the Management Plan as it deems fit. 16 U.S.C. §§ 544d(g) and (h).

Revision or amendment of the Management Plan is a process completely within the authority of the Gorge

Commission. While the doctrine of primary jurisdiction is not implicated in its classic form, the reasoning of the primary jurisdiction doctrine is applicable. Uniformity and consistency in the regulation of Scenic Area land use is better handled through rulemaking adjustments by the agency vested with expertise than by resort to the United States Supreme Court. Ultimately, it is the Gorge Commission and not the courts that is bested suited to change the regulations defining land use rules in the Columbia Gorge National Scenic Area. As this Court noted "it is not for us to write a definition. That is the Administrator's duty." *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 619 (1944).

Further supporting this point is one of the fundamental principles of administrative law — agencies must follow their own rules, particularly when individual rights are affected. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). The Gorge Commission rule at issue in this case is unambiguous. The Gorge Commission clearly has authority to change its rule through its rulemaking authority. 16 U.S.C. § 544d(h). If the Gorge Commission dislikes the Washington Court of Appeals' interpretation of its Management Plan, it need only rewrite the section of the Management Plan at issue. However, the Gorge Commission cannot, through its quasi-judicial function, violate its own rule by ignoring the rule's plain language.

Lastly, petitioners attempt to distinguish the Columbia River Gorge Compact from the Tahoe Regional Planning Compact. Petitioners argue the Lake Tahoe Compact requires the California/Nevada compact entity to consider existing land use standards, while the Gorge Compact includes no such requirement. Pet. at 8. Petitioners fail to reveal that the Columbia River Gorge Compact requires the

Gorge Commission to complete a resource inventory that "documents all existing land uses." 16 U.S.C. § 544d(a)(1)(A). The Columbia River Gorge Compact further requires the Gorge Commission to consider this inventory when developing zoning designations for the Scenic Area. 16 U.S.C. § 544d(b)(1). The Gorge Commission did consider the land use inventory, and the result was its Management Plan directive that state law will determine whether an existing use has a vested right to continue. Pet. App. 11a (quoting the Management Plan).[2]

II. Petitioners Exaggerate the Effect *Woodall* Will Have on Future Management of the Columbia River Gorge National Scenic Area

Petitioners ignore the limiting facts of *Woodall* and thus fall into the trap of reading the teachings of the case too broadly. The most prominent and important conclusion drawn by the *Woodall* court is that unambiguous language in the Management Plan directed that Washington state law governs whether and to what extent a nonconforming use will be permitted to continue. Pet. App. 14a. This specific case fact — that the plain language of the Management Plan directed application of state law — limits the precedential value of the *Woodall* case. Petitioners have not cited to, and respondent is unaware of, any other Management Plan provision which compels application of state law.

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2. The approach of the Gorge Commission is not surprising, given that compact law, like federal law, is interstitial in character. Reference to the underlying state law on a particular issue is a common and recurrent pattern in our system of federalism. *See generally*, Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954).

Strengthening this minimal effect argument further is the point made earlier about the Gorge Commission's delegated authority to amend or revise the Management Plan through rulemaking. The Gorge Commission already may have initiated the rulemaking process of amending its Management Plan to correct any perceived errors in the Washington Court of Appeals' interpretation.

III. Even If Compact Law Is in Need of Clarification, the Facts at Hand Do Not Provide the Court an Apt Vehicle

Respondent will not debate whether the law of interstate compacts is so confused that instruction from the Court is necessary. More germane is that the particular facts of *Woodall* make this case an unsuitable vehicle for this Court to clarify the law of interstate compacts.

1. The Supreme Court Cases Cited by Petitioners do not Support Review

Petitioners cite two cases from this Court for the proposition that interstate compacts cannot be modified through unilateral action by a single state. Pet. at 13-14; *Green v. Biddle*, 21 U.S. (8 Wheat) 1, 40 (1823) (legislation by Kentucky found inconsistent with a prior interstate compact between Kentucky and Virginia); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994) ("no one state can control the course of a Compact Clause entity."). Neither respondent nor the Washington appellate courts disagree with this settled proposition.

The Supreme Court case petitioners cite which is most appropriate for discussion is *State ex rel. Dyer v. Sims*, 341

U.S. 22 (1951). Petitioners properly urge that the case teaches that a political organ of one compact state cannot unilaterally determine the final meaning of an interstate compact term. Pet. at 14. As the Supreme Court noted, this proposition does not require an elaborate argument. *State ex rel. Dyer* at 28. The facts of *Woodall*, however, do not present a violation of this principle.

The *Woodall* facts present an interstate compact where two states each have ceded some of their power to regulate land use for lands surrounding a portion of the Columbia River Gorge. 16 U.S.C. § 544, *et seq*. The express terms of the compact require environmental protection in a specific geographic area and provide for the creation of a bi-state commission (the Columbia River Gorge Commission). The compact directs the bi-state commission to draft, implement, and enforce land use provisions to protect the Scenic Area's resources. *Id.*; Wash. Rev. Code § 43.97.015; Or. Rev. Stat. § 196.150. The terms of the compact also expressly provide that judicial review of actions taken by the bi-state commission are reserved to the state courts of the compacting states — Oregon and Washington. 16 U.S.C. § 544m.

These facts clearly distinguish *Woodall* from *State ex rel. Dyer*. In *State ex rel. Dyer*, West Virginia argued it could not perform its statutory compact duties because performance of those duties violated the state constitution. The effect was a unilateral attempt by West Virginia's executive branch to change the compact. In *Woodall*, two separate entities vested with separate functions by the compacting states disagree over the meaning of the Gorge Commission's administrative rule language, not over the compact. The state appellate court ascertained meaning from the rule's plain language, while the Gorge Commission argues it has statutory authority to interpret

its own rule as it sees fit without regard to existing legal precedent. Oddly, the entity with the power to rewrite the compact term is the one asking the Supreme Court to invoke its authority over the meaning of an administrative rule the entity itself promulgated. This case does not involve the interpretation of the compact — it involves the interpretation of an undefined term in a county ordinance and the plain language of the Gorge Commission's Management Plan.

2. The Federal Circuit and State Court Cases Cited By Petitioners do not Support Review

Petitioners' citation to federal circuit and state cases also is inapposite. Petitioners cite to federal circuit and state cases for the well-established rule that compacts are not subject to state law unless the language of the compact explicitly provides for its application. Pet. at p. 14-15, citing *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Cons. Planning Council*, 786 F.2d 1359 (9th Cir. 1986); *Pievsky v. Ridge*, 98 F.3d 730 (3d Cir. 1996); *Delaware River Port Authority v. State Ethics Comm'n*, 137 Pa. Cmwlth. 170, 585 A.2d 587 (Pa. Cmwlth. 1991); *Malverty v. Waterfront Comm'n of New York Harbor*, 71 N.Y.2d 977, 980, 524 N.E.2d 421, 422 (N.Y. 1988); and *Salmon For All v. Department of Fisheries*, 118 Wn.2d 270, 821 P.2d 1211 (Wash. 1992).

Respondent does not take issue with this well-established rule. The *Woodall* facts, however, do not involve the question of whether application of state law in a compact context must be express rather than implied. In *Woodall*, a compact agency expressly provided by rule that state law should apply, but now argues it does not have to follow the language of its own rule. Pet. App. at 2a-17a. Although the compact treats

the Management Plan like a legislative rule, and although the Gorge Commission drafted the Management Plan and found the county's ordinance consistent with the Management Plan, the Gorge Commission now wants to construe away the Management Plan's plain meaning.

IV. Petitioners' Suggestion of Local Bias Is Unsupported by History

Petitioners' argument that local bias explains the *Woodall* decision is wholly unsupported. Empirical evidence demonstrates Washington upheld Gorge Commission action in four out of six cases.[3] The Gorge Commission has been even more successful in the Oregon appellate courts.[4] The combined total for both states shows the Gorge Commission to be the prevailing party in eight out of ten cases. Petitioners attempt to support their local bias argument by arguing the Washington Court of Appeals failed to give proper deference to the Gorge Commission's interpretation and by likening interstate compacts to international treaties. Neither argument persuades.

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3. *See Schaefco, Inc. v. Columbia River Gorge Commission*, 121 Wn.2d 366, 849 P.2d 1225 (Wash. 1993) (Commission win); *Klickitat County v. State of Washington*, 71 Wn. App. 760, 862 P.2d 629 (Wash. Ct. App. 1993) (Commission win); *Tucker v. Columbia River Gorge Commission*, 73 Wn. App. 74, 867 P.2d 686 (Wash. Ct. App. 1994) (Commission win); *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 26 P.3d 241 (Wash. 2001) (Commission loss). The unpublished *Andersen* case petitioners cite to was a Commission win. The case at issue, of course, was a Commission loss.

4. Respondent is aware of no Oregon state appellate cases which have been decided against the Gorge Commission.

1. Deference is not Appropriate Given the Facts of *Woodall*

A number of reasons argue against deference to the Gorge Commission's proffered meaning of its Management Plan. Set out in this section are the two strongest arguments against deference.

First and foremost is the Gorge Commission's clear and express deferral to state law. Pet. App. at 11a ("Section 10 of the Existing Uses portion of the Commission's Management Plan provides state law applies when dealing with issues of vested rights"). The *Woodall* court parsed the Management Plan language at issue and very persuasively concluded no deferral to the Gorge Commission's interpretation was appropriate because the Management Plan language was unambiguous. Pet. App. at 11a-15a.

Second, the matter of what the "law on vested rights" is in Washington state is a matter which is squarely within the expertise of the Washington courts. Congress and the two states have delegated to the Gorge Commission the job of administering land use in the Scenic Area but not the job of determining Washington state's "law on vested rights." *Compare* 16 U.S.C. §§ 544d and 544e *with* 16 U.S.C. §§ 544m(b)(4) and 544m(b)(6).

2. Petitioners' Comparison of Interstate Compacts to International Treaties is a Poorly-Chosen Analogy

Petitioners support their object and purpose argument by comparing interstate compacts to international treaties. Just as the same word can have different meanings in different

languages argue petitioners, the same term can have different meanings when interpreted under the laws of different states. Pet. at 27-29. If petitioners were asking this Court to interpret the compact's organic act, 16 U.S.C. § 544, such an analogy would be appropriate. It is easy to imagine that each state ratifying a compact might place a different meaning on a compact term. This case, however, involves language used by a bi-state compact agency which, through rulemaking, expressly deferred to state law. This is not a situation where each signatory to the compact must be prohibited from unilaterally determining what the compact means. Instead, it is a situation where the compact agency, the bi-state entity responsible to both states, has spoken clearly. Moreover, the compact agency can unilaterally change the language in question to effect what it believes to be the compact's object and purpose. Respondent concedes that the Gorge Commission's delegated authority includes the power to reject state law on nonconforming uses if it chooses to do so through additional rulemaking.

CONCLUSION

The facts of the case presented to the Court will not assist the Court in clarifying the law of interstate compacts. If clarification is needed, the Court should wait for facts which truly conflict with existing precedent. In addition, the Gorge Commission's ability to legislatively modify the Management Plan language in dispute militates against the importance of the issues in this case. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 01-958

IN THE

Supreme Court of the United States

CHRIS WOODALL AND COLUMBIA RIVER GORGE COMMISSION,
Petitioners,

v.

SKAMANIA COUNTY,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Washington

AMICUS CURIAE BRIEF OF MARK O. HATFIELD AND DANIEL J. EVANS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The question presented in this case is whether an interstate compact agency must apply state law over a subject matter where the State has not expressly reserved state law, nor has Congress consented to application of state law.

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BRIEF *AMICUS CURIAE* OF MARK O. HATFIELD AND DANIEL J. EVANS IN SUPPORT OF PETITIONERS

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Senator Mark O. Hatfield (OR, 1966-1997) and Senator Daniel J. Evans (WA, 1983-89) move this Court for leave to file an *amicus curiae* brief in support of the Petitioners in this case. Respondent Skamania County has withheld its consent.

INTEREST OF *AMICI CURIAE* MARK O. HATFIELD AND DANIEL J. EVANS

MARK O. HATFIELD was governor of the State of Oregon from 1959 to 1967. He served as United States Senator from Oregon from 1967 to 1997. Senator Hatfield served as chairman of the Senate Committee on Appropriations from the 97th through 99th Congress, and again during the 104th Congress, and was chairman of the Energy and Water Appropriations Subcommittee. Senator Hatfield was a member of the Senate Energy and Natural Resources Committee. In the 99th Congress he was a prime sponsor of S. 2055, a bill that later became the Columbia River Gorge National Scenic Area Act.

DANIEL J. EVANS was governor of the State of Washington from 1965 to 1977. He served as United States Senator from Washington from 1983 to 1989. Senator Evans served as a member of the Senate Energy and Natural Resources Committee during his tenure as a United States Senator. Senator Evans served as the first Chairman of the Pacific Northwest Electric Power Planning and Conservation Council from 1981 until his appointment to the United States Senate in 1983. In the 99th Congress he was a prime sponsor of S. 2055, a bill that later became the Columbia River Gorge National Scenic Area Act.

Senators Hatfield and Evans submit this Brief in support of the Joint Petition for a Writ of Certiorari filed by Chris Woodall and the Columbia River Gorge Commission. *Amici* Hatfield and Evans believe the decision of the Washington State Court of Appeals misconstrues the Columbia River Gorge National Scenic Area Act. 16 U.S.C. § 544-544p (2000).

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1986 President Reagan signed into law the Columbia River Gorge National Scenic Area Act, Pub. L. 99-663, 100 Stat 4274 (1986), *codified as amended at* 16 U.S.C. §§ 544–544p (2000). Enactment of the Columbia Gorge Scenic Area Act culminated over 50 years of debate about how to manage the Columbia River Gorge to protect its outstanding scenic, recreation and natural resource values. *Amci* Hatfield and Evans were prime sponsors of S. 2055, the bill that ultimately became the Scenic Area Act.

The Columbia Gorge Scenic Area Act provides the consent of Congress for an interstate compact between Oregon and Washington to manage the Columbia River Gorge. The Act establishes the Columbia River Gorge National Scenic Area, and requires the States to provide a single unified management framework for the scenic area. The Columbia River Gorge Commission was created as an interstate agency to implement the Columbia River Gorge Compact.

In *Skamania County v. Woodall,* 16 P.3d 701 (2001), the Washington State Court of Appeals reversed a lower court decision affirming the authority of the Columbia River Gorge Commission to fashion uniform rules relating to nonconforming land uses. The Commission's rules would apply equally to private land uses in "special management areas" in both Oregon and Washington. Instead, the Court ruled that Washington impliedly reserved the right to have its own state laws apply to the Columbia River Gorge Commission, notwithstanding the fact Congress did not explicitly authorize application of state law to the Commission's Scenic Area Management Plan. *Skamania County,* 16 P.3d at 705-07.

The Columbia River Gorge National Scenic Area Act is patterned after the Pacific Northwest Electric Power

Planning and Conservation Act of 1980 (Northwest Power Act). Pub. L. 96-501, 94 Stat 2697 (1980), *codified as amended at* 16 U.S.C. §§ 839–839h (2000). Sponsors of the Columbia River Gorge National Scenic Area Act were familiar with case law interpreting the Northwest Power Act to require that a state must explicitly reserve its laws for them to apply to an interstate compact agency. They were well aware of the fact this rule would apply to the Scenic Area Act as well.

The Columbia River Gorge National Scenic Area Act explicitly allows the states to reserve state procedural laws relating to formation of the Columbia River Gorge Commission, and its substantive laws governing management of fishing and hunting, forest practices and water rights. The Act does not allow states to subject the Columbia River Gorge Commission to state land use laws.

In *Skamania County, supra,* the Washington State Court of Appeals misinterpreted congressional intent as evidenced by several unique characteristics of the Columbia River Gorge National Scenic Area Act. The Columbia River Gorge Compact was intended to expand upon state power in order to create consistent land use laws for the Columbia River Gorge National Scenic Area. Subjecting the Columbia River Gorge Commission to state land use laws would frustrate the purposes of the Columbia River Gorge National Scenic Area Act.

This case involves the interpretation of a compact between two states. This Court has jurisdiction to review a state court proceeding interpreting the compact. The Court should accept review of the State Court of Appeals decision, and issue the requested Writ of Certiorari to the Washington State Supreme Court.

ARGUMENT

A. The Supreme Court Has Jurisdiction To Review A State Court's Interpretation Of The Columbia River National Scenic Area Act.

The Columbia Gorge Scenic Area Act provides the consent of Congress for an interstate compact between Oregon and Washington to manage the Columbia River Gorge National Scenic Area. 16 U.S.C. § 544c(a)(1)(2000). The Scenic Area Act required the states to establish a bi-state agency known as the Columbia River Gorge Commission to develop a comprehensive land use plan to protect the scenic and recreational values in the Columbia River Gorge. *Id.* The statute sets out in great detail the conditions under which consent was given to the interstate compact.[1] Congress has provided a limited waiver of federal supremacy under the Act, and required federal agency consistency with the Columbia River Gorge Commission's Scenic Area Management Plan. 16 U.S.C. § 544l(d)(2000). Thus, the Scenic Area Act provides congressional approval of regional regulation of resource problems in such a manner as to expand the political power of the states. *See New Hampshire v. Maine*, 426 U.S. 363, 369 (1976).

This Court has jurisdiction to review a state court proceeding interpreting the Columbia River Gorge Compact under 28 U.S.C. § 1257. *State ex rel. Dyer v. Sims*, 341 U.S. 22, 26 (1951); *Delaware River Joint Toll Bridge Comm. v. Colburn*, 310 U.S. 419, 427 (1940). The Court should accept review of the State Court of Appeals decision, and issue the requested Writ of Certiorari to the Washington State Supreme Court.

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[1] Congress may consent to an interstate compact in advance of an agreement between states. *Cuyler v. Adams*, 449 U.S. 433, 441 (1981).

B. Columbia River Gorge Commission Was Created As An Interstate Compact Agency.

The Columbia River Gorge National Scenic Area Act represented approval by Congress of an interstate compact between Oregon and Washington. The purpose of the compact was to create a uniform system of laws governing land management in the Columbia River Gorge National Scenic Area. The Act establishes a "partnership between the Federal Government, the States of Oregon and Washington, and numerous local governments within the Columbia River Gorge for the purpose of protecting and enhancing" property and resources within the Gorge. 132 Cong.Rec. 29496 (Oct. 8, 1986) (remarks of Senator Hatfield). The Act accomplishes this goal by creating the Columbia River Gorge National Scenic Area and ratifying an interstate compact between Washington and Oregon which regulates land use and development activities within the Scenic Area. The Columbia River Gorge Compact has been described as an innovative solution to a difficult interstate land preservation problem. *Columbia Gorge United v. Yeutter, 960 F.2d 110, 115 (9th Cir. 1992) cert. denied, 506 U.S. 863 (1992).*

The Columbia River Gorge Commission was created as an interstate compact agency. The Interstate compact has long been a favorite tool for reconciling competing state interests in the Pacific Northwest. In 1915, Oregon and Washington negotiated the Columbia River Fish Compact, which was ratified by Congress in 1918. Act of April 8, 1918, Pub. L. No. 65-123, 40 Stat. 515. Under the Columbia River Fish Compact, Oregon and Washington have established uniform regulations for harvesting Columbia River salmon runs. In 1980, Congress authorized and directed the four Pacific Northwest states to establish the Northwest Power Planning Council and to enter an interstate compact for purposes of developing a regional plan to

manage the Federal Columbia River Power System. Pacific Northwest Electric Power Planning and Conservation Act. Pub. L. No. 96-501. Following directly in this tradition, Congress in 1986 passed the Columbia River Gorge National Scenic Area Act. Pub. L. 99-663.

C. Columbia River Gorge National Scenic Area Act Was Patterned after the Northwest Power Act.

The principal sponsors of Columbia River Gorge National Scenic Area Act were intimately familiar with the Northwest Power Act. Senator Hatfield also was a sponsor of the Northwest Power Act and was chairman of the Appropriation subcommittee with responsibility for funding to implement the Act. Senator Evans served as the first Chairman of the Northwest Power Planning Council.

Columbia River Gorge National Scenic Area Act is patterned after the Northwest Power Act. *See* Goble, "The Compact Clause and Transboundary Problems: A Federal Remedy for the Disease Most Incident to a Federal Government," 17 Envtl. L. 785, 795 (1987). The Northwest Power Act gives Congressional consent to formation by the Pacific Northwest states of an interstate compact creating the Northwest Power Planning Council. 16 U.S.C. § 839b(a)(2).[2] Similarly, the Scenic Area Act gives Congressional consent to formation by Oregon and Washington of an

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[2]An earlier version of the Northwest Power Act, S. 885, apparently would have established the Council as a federal agency. S. 885 called for the establishment of a five-member council: one member each appointed by the Governor of each Northwest state, the fifth member being the BPA Administrator. S. 885, sec. (4)(a) reprinted in S. Rept. 272, 96th Cong. 1st Sess. At 3 (1979). S. 885 would have required compensation for Council members by the BPA. S. 885, sec. (4)(c).

interstate compact creating the Columbia River Gorge Commission. 16 U.S.C. § 544c(a)(1). The Northwest Power Act allows each Northwest state, subject to its own laws, to appoint two members to the Council. 16 U.S.C. § 839b(a)(2)(B). The National Scenic Area Act allows each state, again subject to its own laws, to appoint six members to the Columbia River Gorge Commission. 16 U.S.C. § 544c(a)(1)(C).

The Northwest Power Act explicitly states the Council is to be considered "a regional agency" and "shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law." 16 U.S.C. § 839b(a)(2)(A). In nearly identical language, the Scenic Area Act declares the Commission to be a "a regional agency" and "shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law." 16 U.S.C. § 544c(a)(1)(A).

The Northwest Power Act states that "members and officers and employees of the Council shall not be deemed to be officers and employees of the United States for any purpose." 16 U.S.C. § 839b(a)(3). The Northwest Power Act directs that compensation of members be fixed by State law. Id. Finally, the Act disclaims any responsibility of the United States for any contract or other obligations of the Council. 16 U.S.C. § 839b(a)(4). The National Scenic Area Act contains identical provisions with regard to the Columbia River Gorge Commission. 16 U.S.C. § 544c(b).

The similarities between the Northwest Power Act and the Columbia River Gorge National Scenic Area Act were intentional. Four years prior to enactment of the Northwest Power Act, this Court decided *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Court ruled that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must, therefore, be appointed" by the President. *Buckley, 424 U.S.*

at 126. At the time Northwest Power Act and the Columbia River Gorge National Scenic Area Act were drafted, the question of applicability of the Appointments Clause to an interstate compact agency were very much an open question.

The Northwest Power Act's sponsors were concerned about the appropriate balance between state and federal interests. See e.g., 126 Cong.Rec. 30181 (1980) (remarks of Sen. McClure) ("The Pacific Northwest does not need and candidly will not suffer lightly a federally imposed regional planning process with apparent input from Washington acting as a federal agency."); *See also* 126 Cong.Rec. 30181 (1980) (remarks of Sen. Hatfield). At the same time, the Northwest Power Act was drafted in such a manner as to avoid the potential constitutional problems of a federal agency composed of state appointees. H.R.Rep. No. 96-976 (Part II), 96th Cong., 2d Sess. 40-41 (majority views), 70-71 (supplemental views of Rep. Williams)(1980). Those who participated in the enactment of the Columbia River Gorge National Scenic Area Act held similar views. When it passed the Columbia Gorge Scenic Area Act, Congress very clearly was attempting to delegate resolution of what it saw as regional concerns to a state-created body, and to avoid to the extent possible usurping what were seen as traditional state prerogatives in favor of direct federal control. See e. g., 132 Cong. Rec. S15645-49 (Daily ed. Oct. 8, 1986) (colloquy between Senators Evans, Hatfield, McClure, Gorton and Wallop).

D. Sponsors Of The Columbia Gorge National Scenic Area Act Were Familiar With Case Law To The Effect That A State Must Explicitly Reserve Its Laws For Them To Apply To An Interstate Compact Agency.

Congress is presumed to be familiar with case law. *Miles v. Apex Marine Corporation*, 498 U.S. 19, 32 (1990) ("When Congress passed the Jones Act, the [*Michigan Central R. Co. v.*] *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established."). Sponsors of the Columbia River Gorge National Scenic Area Act were intimately familiar with litigation concerning the Northwest Power Act. In particular, the sponsors were familiar with *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Cons. Planning Council*, 786 F.2d 1359 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

In *Seattle Master Builders*, the Ninth Circuit Court of Appeals ruled that a State must reserve its laws for them to apply to the Northwest Power Planning Council, an interstate compact agency. The Ninth Circuit heard oral argument in the *Seattle Master Builders* case on May 9, 1985. The Court decided the *Seattle Master Builders* case on April 10, 1986, and the Court's amended opinion was published on June 11, 1986. Senators Evans, Gorton, Hatfield and Packwood introduced S. 2055 on February 6, 1986.[3] A final version of the bill was prepared in the late spring of 1986, and the bill reported by the Senate Energy and Natural Resources Committee on August 14, 1986. On October 8, 1986, *Amici* Hatfield and Evans offered a substitute amendment to S. 2055 on the Senate floor, which was

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[3] S. 2055, 99th Cong., 2nd Sess., introduced at 132 CONG. REC. S1146 (daily ed. Feb. 6, 1986), text at 132 CONG. REC. S1148-55.

adopted by the Senate on final passage of the Scenic Area Act. Drafting by the Senators of the final version of the National Scenic Area Act, and a decision by the Ninth Circuit of the *Seattle Master Builders* case, essentially were contemporaneous events.

In this particular instance, the sponsors of S. 2055 also were personally familiar with the *Seattle Master Builders* case. At issue in that case was the application of model conservation standards. Senator Evans served as Council chairman when the standards were adopted. Evans received a thorough briefing on the case as early as 1984. *See* Memorandum to Senator Daniel J. Evans from Joe Mentor, Jr., Legislative Counsel to Senator Evans (December 26, 1984) (on file in the Washington State Archives). Senator Hatfield was chairman of the Energy and Water Appropriations Subcommittee of the Senate Appropriations Committee, the subcommittee overseeing funding for implementation of the Northwest Power Act.

Their familiarity with *Seattle Master Builders* meant the sponsors of S. 2055 were well aware of the Ninth Circuit's ruling that a compact must explicitly reserve state laws for them to apply to constrain an interstate compact agency. The Columbia Gorge Scenic Area Act explicitly required the States to adopt the Act as part of compact enabling legislation. Consequently, the sponsors were aware of the fact that omitting state land use laws from section 17 of the Scenic Area Act meant the States were prevented from reserving their land use laws for the Commission to apply.

E. The Columbia Gorge Scenic Area Act Explicitly Allows The States To Reserve State Procedural Laws Relating to Formation of the Columbia River Gorge Commission, And Substantive Laws Governing Management Of Fishing And Hunting, Forest Practices, And Water Rights. The Act Does Not Allow States To Subject The Columbia River Gorge Commission To State Land Use Laws.

In the Columbia River Gorge National Scenic Area Act, Congress gave its consent in advance to the Columbia River Gorge Compact. The Act expressly reserved state laws governing administrative procedures, water rights, and management of fishing, hunting and forest practices on private lands. 16 U.S.C. 544(o). Congress did not authorize, nor did the states explicitly reserve, each state's land use laws. The fact that a contrary result was intended is clear from the reservation of other laws. The omission of a reservation of state land use laws from section 17 of the Scenic Area Act was intentional. The context of this provision, i.e., reserving certain state laws from a scheme intended to provide consistency between applicable land use laws, lends itself to application of the canon of statutory interpretation that the mention of some implies the exclusion of others not mentioned. *Compare Dole v. Dominion Industries, Inc.*, *United States*, 532 U.S. [illegible] (2001) (Soundness of premise that expression of one thing implies exclusion of others is a function of timing); *Smith v. United States*, 511 U.S. 485 (1994) (Souter, J., dissenting) (Application of canon depends largely on context.).

F. The Washington State Court of Appeals has Misinterpreted Congressional Intent as Evidenced by Several Unique Characteristics of the Columbia River Gorge National Scenic Area Act

The Washington Court of Appeals wrongly attributes the intent of Congress to a number of unique features of the Columbia River Gorge National Scenic Area Act. *Amici* were prime sponsors of the bill that ultimately became the Columbia Gorge National Scenic Area Act. They will respond below to each of the factors in the order discussed by the Washington State Court of Appeals.

> "First, Congress's decision not to make the Commission a federal agency suggests it wanted the Commission to apply state law. Had Congress wanted the Commission to apply federal law, it could have made the Commission a federal agency." *Skamania County, 16 P.3d at 705-06.*

Like the Northwest Power Act, the Scenic Area Act provides, "The Commission ... shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law[.]" 16 U.S.C. § 544c(a)(1)(A). At every opportunity, Congress took great pains to ensure that the Commission would function as an interstate compact agency, not as a federal agency. That is because the sponsors of the bill wanted to ensure the Scenic Area land use guidelines would be developed by representatives of state and local governments whose land was most directly affected by establishment of the National Scenic Area. They were concerned above all about avoiding a *Buckley v. Valeo* problem, and so they took great pains to clearly establish the Columbia River Gorge Commission as an interstate compact agency. They also were concerned about the risks

and controversy inherent in imposing "federal zoning" over the Scenic Area. So they ensured the law required the States to provide the Commission with authority under state law - not federal law -- to develop uniform, consistent land use standards.

> "Second, Congress's decision to give state courts almost exclusive jurisdiction over appeals from Commission action suggests Congress intended the Commission to apply state law. Had Congress wanted the Commission to apply federal law, it would have placed appeals from the Commission primarily in the federal courts." *Skamania Cy., 16 P.3d at 706.*

The judicial review provisions of the Act do not reflect in any way on the question whether Congress allowed the Commission to fashion its own land use rules. Instead, they carefully reflect the partnership between the states and the federal government. Under section 15 of the Scenic Area Act, the state courts have jurisdiction over appeals of enforcement decisions by the Secretary of Agriculture. 16 U.S.C. § 544p(5). The state courts have jurisdiction to hear appeals of enforcement and implementation decisions. 16 U.S.C. § 544p(6).

> "Third, the legislative history suggests Congress did not want the Commission applying federal law to a zoning case like this. The backers of the Act made specific changes to address President Reagan's concerns that the Act would amount to federal zoning laws. A substantial amount of the Commission's work is zoning. If courts were to review Commission actions under federal law, this would raise the specter of federal zoning. Moreover, "[t]here is . . . No federal law of zoning," so it is unclear what courts would apply." *Skamania Cy., 16 P.3d at 706* (citations omitted).

The legislative history of the Scenic Area Act is replete with references to the ongoing dialogue that took place between the drafters of S. 2055 and the Reagan Administration. *See e.g.*, Letter from George S. Dunlop, Assistant Secretary, U.S. Department of Agriculture, to Senator Slade Gorton, *reprinted in* 132 Cong. Rec. S 15628 (Daily ed. Oct. 8, 1986). The discussions between Congress and the Administration over the subject of "federal zoning" lead to a clear separation between the roles of the Commission and the Secretary of Agriculture. This separation, however, has little or no relevance when considering whether the Commission, or any other interstate compact agency, is free to fashion its own rules of law in an area where the Commission is specifically formed to develop uniform rules of law.

> "Fourth, Congress's approval of the Compact suggests it wanted the Commission to apply state law. Congress approved the Compact, knowing it expressly provided that 'the provisions of [the Columbia River Gorge Compact] hereby are declared to be the law of this state.'" *Skamania Cy., 16 P.3d at 706.*

This statement truly is perplexing. Of course the Washington Legislature declared the Columbia River Gorge Compact to be the law of Washington State. That means the Compact is incorporated into Washington state law, not *vice versa*. It would be illogical to suggest otherwise since the Compact plainly preempts certain state prerogatives.

> "Fifth, Congress's decision not to dictate that federal law apply suggests it intended the Commission to apply state law. When Congress placed urisdiction almost exclusively in the state courts, it did not command the state courts to apply federal law. Congress had to know that absent such a command, Washington state courts are required to

apply Washington state common law." *Skamania Cy., 16 P.3d at 706.*

The Court of Appeals based its ruling in this regard on RCW 4.04.010, which dates back to the days of the Washington Territory. Wash. Territory Laws 1862, p. 83, § 1. The state statute reads as follows:

> "The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state." RCW 4.04.010 (2001).

The fact the State of Washington adopted the common law at statehood is unconvincing. Every state except perhaps Louisiana adopted the common law. *See* L. Friedman, History of American Law 96, 318 (1973). According to the Washington Supreme Court, RCW 4.04.010 "refers to the unwritten law of England, as administered by its courts, and also its modifying general statutes in force at time of our Declaration of Independence." *Garrett v. Byerly,* 284 P. 343, 354 (1930). In no way should this statute be read to preclude the Congress from requiring Oregon and Washington to provide the Commission with authority to develop uniform land use standards that apply equally in both states.

> "Sixth, the Management plan suggests the Commission thought Congress had at least allowed it to apply state common law in cases involving vested rights." *Skamania Cy., 16 P.3d at 707.*

True enough, the Scenic Area Act is flexible enough to allow the Commission to fashion its own rules, consistent with guidelines contained in the Scenic Area Act and subject to approval by the Secretary of Agriculture. That does not mean the Commission is forced to use state

vesting laws or other substantive state rules. This Act and the Compact represent a contract between the states and federal government under which they share responsibilities to manage the Columbia Gorge National Scenic Area. The Commission is not a federal agency, rather, the Commission derives its authority from state law, but is not bound by the rules or precedents of any one state when developing its management plan.

G. The Columbia River Gorge Compact Was Intended To Expand Upon State Power In Order To Create Consistent Land Use Laws for the Columbia River Gorge National Scenic Area.

An agreement between states that does not expand state authority does not require Congressional approval. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). Consequently, the states didn't need an Act of Congress if the only purpose was to establish a Commission with no power to impose consistent land use standards. In fact, in the 1950s, the states created separate Gorge Commissions with advisory roles, which adopted parallel advisory plans in 1976. *See e. g.* Washington Columbia River Gorge Comm'n, *A Resource Management Program for the Columbia Gorge, State of Washington* (1976) and Oregon Columbia River Gorge Comm'n, *A Resource Management Program for the Columbia Gorge, State of Oregon* (1976). The Bi-State Columbia River Gorge Commission failed to develop a cohesive management plan for what became the Columbia River Gorge National Scenic Area. During debate in the House of Representatives on the Scenic Area Act, Congressman Sid Morrison (R-WA), explained that, despite the existence of the old Gorge Commissions, there were differences in land use regulation in the two states, "and obviously those differences exist or we probably would not have this legislation in front of us today." 132 Cong. Rec. 32197 (1986)(remarks of Rep. Morrison).

H. Subjecting the Columbia River Gorge Commission to State Land Use Laws Would Frustrate the Purposes of the Columbia River Gorge National Scenic Area Act.

A stated purpose of the National Scenic Area Act was "to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge." 16 U.S.C. § 544a. During Senate debate on S. 2055, the sponsors of the bill explained how they intended for the Scenic Area Act to accomplish this purpose. According to Senator Hatfield,

> "The Columbia Gorge will be managed as a single geographical unit, and this management scheme will reflect the area's economic, environmental, social, geologic, cultural, and recreational diversity. Under this arrangement, three distinct management classifications will be established. [One of the classifications includes] ... four special management areas (SMAs), containing lands of exceptional scenic, cultural, natural, and recreational values suitable for special Federal supervision." 132 Cong. Rec. S15636 (Daily ed. Oct. 8, 1986).

Senator Evans explained the bill as follows:

> "Under S. 2055, a dual approach will be used to develop a single management strategy. The bill gives congressional consent to an interstate compact between Oregon and Washington to create the Columbia Gorge Commission. The Commission will have primary responsibility for planning for the Columbia Gorge National Scenic Area. The Commission will develop a comprehensive management plan for the national scenic area, in accordance with the guidelines set forth in the

> legislation. The bill also gives the U.S. Forest Service a role in the management of approximately 112,000 acres of land [in the special management areas] with outstanding scenic, cultural, recreational, and natural resource value. Together they will result in a unified strategy for land management.
>
> There are a diverse and sometimes competing array of interests in the gorge. Some are national in scope, some regional, some State and some local. Members of the Commission will be appointed by the Governors of Oregon and Washington and will develop a management plan which balances the local, State, and regional interests. The national interest is protected through the guidelines of the Federal legislation and the involvement of the Forest Service in management of truly special areas. Of course, no legislation to establish a national scenic area in the Columbia Gorge would be successful without the active participation and support of local governments. Consequently, the bill relies on counties to develop implementation measures to effectuate the land management plan." 132 Cong. Rec. S15639 (Daily ed. Oct. 8, 1986).

It is clear from the legislative history that Congress intended for the Commission to develop a comprehensive management plan for the National Scenic Area, under federal supervision. It is clear from the Senate debates that, as a condition to approval of the Columbia River Gorge Compact, Congress intended for the States to provide the Commission with authority to develop land use guidelines of general applicability in Special Management Areas in both Oregon and Washington. Requiring the Commission to apply Washington land use law on one side of the river, and Oregon law on the other side, would defeat the purpose of the Act that gives rise to the compact. It is well-settled doctrine of this Court to read a statute, assuming

that it is susceptible of either of two opposed interpretations, in a manner that effectuates rather than frustrates the major purpose of the legislative drafters. *Shapiro v. United States*, 335 U.S. 1, 31 (1948). As this Court has previously stated, "It is not for us to so construe the Acts as to frustrate this clear-cut purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption." *First Nat. Bank of Logan, Utah v. Walker Bank & Trust Co.* 385 U.S. 252, 261 (1966).

CONCLUSION

Subjecting compact agencies to state law in the very subject area where Congress intended compact approval to apply would leave the compact agency with no more power than the states already had before the Act was passed. This result would eviscerate the Compact Clause as a mechanism to provide creative solutions to regional problems. This is not what Congress intended when it passed the Columbia River Gorge National Scenic Area Act. This should not be the result this Court allows today.

This case presents a substantial question of federal law. The Supreme Court should provide review of the case and determine whether, as a matter of federal law, an interstate compact agency must apply state law over a subject matter where the State has not expressly reserved state law, nor has Congress consented to application of state law.

Respectfully submitted,

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No. 01-958

IN THE

Supreme Court of the United States

CHRIS WOODALL AND COLUMBIA RIVER GORGE COMMISSION,
Petitioners,

v.

SKAMANIA COUNTY,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of the State of Washington

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE DELAWARE RIVER PORT AUTHORITY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

The Delaware River Port Authority of Pennsylvania and New Jersey ("DRPA") respectfully moves for leave to file the attached brief *amicus curiae* brief in this case. The consent of the attorneys for each of the Petitioners was obtained and filed with the Clerk of the Court. The consent of the attorney for Respondent was requested but refused.

The interest of the DRPA in this case arises from the fact that it, like Petitioner CRGC, is a bi-state public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey, created pursuant to the Compact Clause of Article I of the United States Constitution, art. I, § 10, cl. 3. The Washington Court of Appeals' decision imposed the common law of Washington on a bi-state entity without authorization from Washington's legislature and in the face of conflicting Oregon law. The Washington Court of Appeals' decision added to a growing conflict concerning the appropriate legal standard for application of a single state's law to a bi-state entity between federal and most state courts, on the one hand, and certain state courts, on the other hand — specifically, the state courts of Washington and New Jersey.

Recently, the DRPA has been faced with New Jersey state courts issuing decisions based solely on New Jersey statutory or common law in derogation of its bi-state compact. It is likely that the legal issue in this case will continue to recur until this Court sets forth a clear, uniform and workable federal legal standard concerning how and when courts may impose a single state's law on a bi-state compact entity.

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BRIEF OF THE DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Delaware River Port Authority of Pennsylvania and New Jersey ("DRPA") files this *amicus curiae* brief in support of the Petition for Writ of Certiorari filed by Petitioners, Chris Woodall ("Woodall") and the Columbia River Gorge Commission ("CRGC"), for review of the decision below from the Washington Court of Appeals ("Washington Court").[1] Both Petitioners have consented to the filing of this brief and their consents have been filed with the Clerk of this Court. However, since Respondent Skamania County has not consented to the DRPA's appearance at this stage, the DRPA has filed the preceding Motion for Leave to appear as an *amicus curiae*.

THE DRPA'S INTEREST AS *AMICUS CURIAE*

Similar in nature to Petitioner CRGC, the DRPA is a bi-state public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey, created with Congressional approval pursuant to the Compact Clause of Article I of the United States Constitution, art. I, § 10, cl. 3. *See* N.J.S.A. 32:3-1 *et seq.;* Pa. Stat. Ann. tit. 36, § 3503 *et seq.*

The DRPA currently operates four interstate bridges between Pennsylvania and New Jersey across the Delaware River — the Benjamin Franklin, the Walt Whitman, the Commodore Barry and the Betsy Ross. Through a wholly-owned subsidiary, the DRPA operates a high-speed transit line between Philadelphia, Pennsylvania, and Lindenwold, New Jersey. Through another division, the DRPA also

1. Counsel for DRPA authored this brief in whole and no monetary contribution was made by any other person for the preparation or submission of the brief.

provides promotional and strategic planning assistance to the region's maritime facilities and is responsible for regional export development through its network of international representatives. DRPA's revenue for all of its activities in 2000 was $240,763,000. *DRPA's Comprehensive Annual Financial Report for the Year Ended December 31, 2000,* at 60.

Under the DRPA's Compact, the DRPA is authorized to undertake only those activities and operations that have been approved by the legislatures of Pennsylvania and New Jersey. For a single state's law to apply to the DRPA, it must be *"concurred in by legislation of the other."* N.J.S.A. 32:3-5; Pa. Stat. Ann. tit. 36, § 3503 (Art. IV).

DRPA has a substantial interest in this case. By holding that Washington common law should control a dispute involving land within the CRGC's purview in the face of conflicting Oregon law, the Washington Court added to a growing conflict among federal and state courts concerning rules for determining whether and when a single state's law or policy may be imposed upon bi-state or multi-state entities. The Washington Court's decision, like recent decisions from the New Jersey state courts, deviated from the analytical framework formulated and applied by federal courts and a number of other state courts across the country examining the application of state law to a bi-state entity.

The DRPA submits that, where a standard has not been expressly specified in a bi-state compact entity's enabling legislation, a uniform federal standard must be utilized. The appropriate formulation of this standard is necessary to resolve the important federal question of when courts may impose state law obligations on bi-state entities created by federal law compacts. Absent a clear and workable standard, bi-state entities will continue to be subject to entirely different, and potentially conflicting, standards for imposing creator-state obligations, with all the attendant problems of forum-shopping, and with the outcome of disputes depen-

dant upon which of their creator states' courts is deciding the dispute.

The issue concerning application of a single state's law to a bi-state entity has recently surfaced with increasing frequency for the DRPA and other bi-state compact entities, yet this Court has not reviewed the issue. *See, e.g., Dezaio v. Port Auth. of New York and New Jersey,* 205 F.3d 62 (2d Cir.), *cert. denied,* 531 U.S. 818 (2000); *Fraternal Order of Police, Penn-Jersey Lodge 30 v. Delaware River Port Auth.,* 323 N.J.Super. 444, 733 A.2d 545 (App. Div. 1999), *certif. denied,* 162 N.J. 663, 745 A.2d 1213 (1999), *cert. denied,* 530 U.S. 1275 (2000); *Int'l Union of Op. Eng'rs, Local 68 v. Delaware River and Bay Auth.,* 143 N.J. 328, 670 A.2d 1068 (1996), *cert. denied,* 522 U.S. 861 (1997). Until the issue is settled by this Court, the body of law applicable to bi-state entities will continue to evolve in an unpredictable, unworkable, and problematic fashion. A clear, workable, and uniform federal standard is necessary.

ARGUMENT

I. The Issue Presented Potentially Affects Nearly 200 Bi-State Compact Entities Throughout The Nation And Is Important.

The Compact Clause of the United States Constitution expressly prohibits two states from entering into an agreement without first receiving the consent of the United States Congress. U.S. Const. Art. I, § 10, cl. 3. In interpreting the Compact Clause, this Court has held that once Congressional consent has been given, "unless the compact to which Congress has consented is somehow unconstitutional, *no court may order relief inconsistent with its express terms." Texas v. New Mexico,* 462 U.S. 554, 564 (1983) (citing *Cuyler v. Adams,* 449 U.S. 433, 438 (1981)) (emphasis added).

In addition to the CRGC and the DRPA, Congress has authorized approximately 194 bi-state or interstate com-

pacts. Council of State Governments, *Interstate Compacts & Agencies* (1998), *reprinted at http://ssl.scg.org/compactlaws/master98.pdf*. These compact entities carry out essential governmental objectives, including facilitation of substantial interstate trade and commerce. *Id.*

If review is not granted, future application of the Washington Court's decision could have the following effects on the DRPA and other similarly situated bi- and multi-state compact entities:

- Courts in states that have created bi- or multi-state compacts will be free to utilize different and conflicting legal standards for determining whether they may apply their state laws and/or policies to their bi-and multi-state compact entities;

- Plaintiffs will select the state laws and/or policies that are most favorable to them, regardless of bi-state concurrence, through forum-shopping;

- Through its court system, a single creator state will unilaterally apply its own substantive laws and policies on its bi-state entities, as occurred in this case;

- Creator state courts that unilaterally impose state law obligations on bi-state entities will violate the Compact Clause of the United States Constitution and federal law; and

- Ultimately, this Court, under its original jurisdiction, will be asked to rule on lawsuits filed between and among creator states seeking to enjoin the application of another creator state's laws and policies to jointly created bi-state entities.

This Court should grant review to establish a uniform and workable federal legal standard for application of state law to bi-state entities created under the Compact Clause.

II. This Court Should Grant Review To Establish An Appropriate Uniform Federal Legal Standard For Analyzing The Important Federal Question Of When, If Ever, A Single State's Laws May Be Imposed On A Bi-State Entity.

Like the CRGC, the DRPA is a product of three sovereigns — two states and the United States Congress. In creating the DRPA, Pennsylvania and New Jersey did what all states do when creating a compact entity — they surrendered a portion of their own sovereignty to the entity, including their powers to unilaterally impose and enforce their own state laws and policies on the entity. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) ("An interstate compact, by its very nature, shifts a part of the state's authority to another state or states, or *to the agency* the several states jointly created to run the compact."); *United States v. Belkins*, 304 U.S. 27 (1938); *C.T. Hellmuth & Assocs. v. Washington Metro. Area Transit Auth.*, 414 F. Supp. 408, 409-10 (D. Md. 1976).

As this Court has acknowledged, "no one state can control the course of a Compact Clause entity" due to this grant of sovereignty. *Hess*, 513 U.S. at 47. Thus, a single state's law can only apply to a bi-state entity where there is "consent of all parties" to the compact. *C.T. Hellmuth*, 414 F. Supp. at 409; *see also Dezaio v. Port Auth. of New York and New Jersey, supra*, 205 F.3d at 65 ("bi-state entities created by compact . . . are not subject to the unilateral control of any one of the States that compose the federal system").

One line of authority holds that creator states may not unilaterally impose additional duties or obligations on their bi-state entities that contravene the terms of their compacts, absent an "express statement" of intent from both states' legislatures. *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 314 (1990) (Brennan, J., concurring); *Delaware River Port Auth. v. Fraternal Order of Police, Penn-Jersey Lodge 30 ("FOP")*, 135 F. Supp.2d 596 (E.D. Pa. 2001), *appeal*

docketed, No. 01-1866 (3d Cir. Apr. 10, 2001) ("express statement" of applicability required); *C.T. Hellmuth, supra,* 414 F. Supp. at 409-10; *Malverty v. Waterfront Comm'n of New York,* 71 N.Y.2d 977, 980, 524 N.E.2d 421, 422, 529 N.Y.S.2d 67, 68 (1988) ("express statement" of intent required); *Delaware River Port Auth. v. Comm. of Pennsylvania,* 137 Pa. Commw. 170, 172-73, 585 A.2d 587, 588 (1991) ("joint legislation by the two creator states" required); *Nardi v. Delaware River Port Auth.,* 88 Pa. Commw. 558, 560, 490 A.2d 949, 950 (1985); *Delaware River & Bay Auth. v. Carello,* 43 Del. Ch. 213, 222 A.2d 794 (1966) ("concurrent legislative action" required).

In conflict with this well-established line of authority, the Washington Court relied solely on Washington common law to review a CRGC action despite directly conflicting Oregon law on the relevant point, namely, construction of the term "discontinued." *Compare Andrew v. King Co.,* 21 Wash. App. 566, 572, 586 P.2d 509, 513-14 (1978), *review denied,* 91 Wash.2d 1023 (1979) (term "discontinued" implicitly requires proof of intent to abandon), *with Polk Cty. v. Martin,* 292 Or. 69, 82, 636 P.2d 952, 960 (1981) (term "discontinued" contained in ORS 215.130 does *not* require any intent to abandon). There was no "express statement" of intent from Washington's legislature regarding the meaning of the term "discontinued," and the case was not analyzed in that fashion.

By failing to apply the "express statement" of intent standard for determining whether and when state law applies to a bi-state compact entity, the Washington Court added to the growing conflict among courts regarding the proper legal standard for application of state law to bi-state compact entities.

A. All Federal Courts And Some State Courts Have A Standard Requiring An "Express Statement" Of Intent And Legislative "Concurrence" Before Imposing One Creator State's Law On Bi-State Entities.

Presently, all federal courts and a majority of state courts engage in a two-part analysis before imposing a state law on a bi-state entity: First, does the state law "expressly" apply to the bi-state entity, or has it generally been made applicable to bi- or multi-state entities? If so, have each of the creator states enacted "concurrent" legislation to further suggest the applicability of state law?

There are numerous examples of courts that have refused to impose a state law on a bi-state entity where that law was not made expressly applicable to the bi-state entity — thus failing the first prong of the test.

By invoking a Maryland statute affording access to public records, the plaintiff in *C.T. Hellmuth v. Washington Metropolitan Area Transit Authority* attempted to obtain records from a multi-state agency created by compact among Maryland, Virginia and the District of Columbia. The District Court refused to impose the Maryland statute because it was not expressly applicable to multi-state entities. That each of the states to the compact had enacted "equivalent legislation" was irrelevant, because the court never moved past the first prong of the test. 414 F. Supp. at 409 ("the mere fact that Virginia and the District have adopted freedom of information laws can hardly be taken as a tacit agreement on their part that WMATA should be governed by the Maryland law. . . .").

Similarly, in *Malverty v. Waterfront Commission of New York*, a convicted felon challenged a determination by the bi-state Waterfront Commission of New York Harbor ("Waterfront Commission"), denying his application to be restored to the longshoremen's register as violative of New York's Correction Law. The Court of Appeals ruled that New

York's Correction Law did not apply to the Waterfront Commission, notwithstanding a statute in New Jersey that "evinced the same, or similar, public policy regarding employment opportunities for former inmates . . . ." 71 N.Y.2d at 980, 524 N.E.2d at 422, 529 N.Y.S.2d at 68. Similar public policies were, in the court's view, simply not sufficient "to render [the compact] properly amended or supplemented such that the Commission would be subject to the provisions of the New York [law]." *Id.*

Applying the *Malverty* court's analysis, the Second Circuit Court of Appeals and federal District Courts in New York and New Jersey have refused, on several occasions, to apply either state's anti-discrimination laws to their bi-state entities even though New York's Human Rights Law and New Jersey's Law Against Discrimination were enacted to promote similar policies. *Dezaio v. Port Auth. of New York and New Jersey, supra,* 205 F.3d at 65 ("Nothing has been cited suggesting that New York's or New Jersey's anti-discrimination laws were *intended* to affect the internal operations of the Port Authority"); *accord Settecase v. Port Auth. of New York and New Jersey,* 13 F. Supp.2d 530, 535 (S.D.N.Y. 1998) ("If New York and New Jersey intend their own anti-discrimination laws to apply to the Port Authority, they have the means to do so clearly and *expressly*, as they have done for other laws.") (emphasis added); *Baron v. Port Auth. of New York and New Jersey,* 968 F. Supp. 924, 929 (S.D.N.Y. 1997) ("the statute must *expressly* state that the 'legislation [is] amending a certain portion of the 'Compact' and the new law would take effect upon the enactment into law by New Jersey of legislation having an effect identical to New York's legislation'") *(quoting Malverty); King v. Port Auth. of New York and New Jersey,* 909 F. Supp. 938, 946 (D.N.J. 1995) ("the single law of one state may not be applied to a bi-state entity unless the law of all relevant states are *identical* or the states *explicitly articulate* that the law should apply") (emphasis added), *aff'd,* 106 F.3d 385 (3d Cir. 1996).

Securing an affirmative answer to the first question does not ensure that the state law will apply.

In *Nardi v. Delaware River Port Authority,* the Pennsylvania Commonwealth Court evaluated whether the Pennsylvania Enforcement Officers Disability Benefits Law ("Pennsylvania Benefits Law"), 53 Pa. Cons. Stat. §§ 637-38, which was designed for the specific purpose of providing disability benefits to the DRPA's police officers, nevertheless required the DRPA to pay supplementary disability benefits to a disabled DRPA police officer. 88 Pa. Commw. at 560, 490 A.2d at 950. New Jersey had enacted a counterpart to the Pennsylvania Benefits Law, N.J.S.A. 32:3A-1, and *both* laws were "expressly" applicable to the DRPA.

Despite the express applicability of the statutes, Pennsylvania's Commonwealth Court refused to award the officer benefits under the statute, because the Pennsylvania Benefits Law required that the DRPA *"shall"* provide disability benefits to its police officers, while the New Jersey Law merely provided that the DRPA *"may"* provide such benefits at its discretion. *Id.* at 562, 490 A.2d at 951. The court viewed the Pennsylvania law as "a unilateral legislative act *imposing* an additional burden on the Authority," compelling payment of benefits that had never been mentioned in the DRPA's enabling Compact, whereas the New Jersey law "was a unilateral legislative act *restricting* a power already possessed by the Authority." *Id.* at 565, 490 A.2d at 952 (emphasis added).

From this dispositive distinction, the Commonwealth Court ruled that "[t]he Pennsylvania legislature has demonstrated that it does not concur" with New Jersey's legislature. *Id.* In so holding, Pennsylvania followed the more exacting, and generally accepted, standard that must be satisfied before one compact state may permissibly impose its laws on a bi-state entity such as the DRPA. Therefore, even where express statements in both states' statutes seem to make the statutes applicable to the DRPA,

a *minor difference in language* often proves significant in determining whether concurrence exists.

B. Washington And New Jersey State Courts Have Implemented A Different Test For Analyzing The Imposition Of State Law On Bi-State Entities.

By contrast, New Jersey state courts have recently developed a "complementary and parallel" legislation test from which courts could *imply* legislative consent to the application of a single state's statutes to a bi-state entity. Using this test, courts must (1) conduct a "painstaking" analysis of the allegedly "complementary and parallel" statutes, to establish that they are virtually identical in their terms, and (2) demonstrate evidence of "some intent" that the statutes apply to a bi-state entity. *Eastern Paralyzed Veterans Assn. v. City of Camden,* 111 N.J. 389, 545 A.2d 127 (1989); *Bell v. Bell,* 83 N.J. 417, 310 A.2d 829 (1980). While not demanding the same level of creator state concurrence, courts applying this standard have refused to impose, *inter alia*, New Jersey's anti-discrimination or whistleblowing laws, on bi-state entities. *Id.* (refusing to impose New Jersey's Law Against Discrimination on DRPA); *Ballinger v. Delaware River Port Auth.,* 311 N.J. Super. 317, 709 A.2d 1336 (App. Div. 1998) (refusing to impose New Jersey's Conscientious Employee Protection Act on DRPA), *cross-petition for certif. docketed,* Case No. 51,504 (N.J. 2001).

However, New Jersey state courts have been more permissive and now permit any creator state to impose its *public policies* on a bi-state entity through a mere showing that similar policies exist in both creator states. *Int'l Union of Operating Eng'rs Local 68 v. Delaware River and Bay Auth., supra,* 147 N.J. at 443-45, 688 A.2d at 574-75. This "similar public policy" imposes state law in the absence of legislative authority or legislative consent from either creator state. *See, e.g., Bunk v. Port Authority of New York and New Jersey,* 144 N.J. 176, 676 A.2d 118 (1996);

Fraternal Order of Police Penn-Jersey Lodge 30 v. Delaware River Port Auth., supra, 323 N.J. Super. at 459-60, 733 A.2d at 554. These decisions provide an obvious and important incentive for forum-shopping by plaintiffs trying to benefit from a single state's law in suits against bi-state entities, behavior that ultimately threatens the viability of their compacts.

With the exception of the New Jersey state courts, and now the Washington Court, no other courts have dispensed with the "express statement" of intent test. As the Eastern District of Pennsylvania recently stated in a case involving the DRPA: *"no federal court . . . has adopted New Jersey's more permissive view, and this Court has not been persuaded to become the first." Pilla v. DRPA,* 1999 WL 345918, at *4 (E.D. Pa. May 7, 1999) (emphasis supplied).

The conflicting standards now in use to determine application of state law to a bi-state entity are frequently outcome-determinative. A bi-state entity may be held bound by one of its creator state's law or public policies, but not the other's. Review in this case would establish a uniform, workable legal standard concerning what state law applies to bi-state entities so that bi-state entities may conform their conduct to applicable law.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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No. 01-958

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IN THE

Supreme Court of the United States

CHRIS WOODALL AND COLUMBIA RIVER GORGE COMMISSION,
Petitioners,

v.

SKAMANIA COUNTY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

---

PETITIONERS' JOINT REPLY BRIEF

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PETITIONERS' JOINT REPLY BRIEF

Pursuant to Rule 16.6, Petitioners reply to two new issues raised by Skamania County in its Brief in Opposition (Opp. Br.): (1) that Petitioners have mischaracterized the Washington Court of Appeals' holding and the arguments of the parties below (Opp. Br. 3); and (2) that Petitioner Columbia River Gorge Commission can simply amend its uniform standards to clarify its intended meaning for the provisions at issue (Opp. Br. 5-8).

I. PETITIONERS HAVE NOT MISCHARACTERIZED THE DECISION OF THE WASHINGTON COURT OF APPEALS AND THE ARGUMENTS ADVANCED BY THE PARTIES BELOW.

Respondent mistakenly asserts that the Petitioners have mischaracterized both the decision of the Washington Court and the arguments of the parties below.

First, Petitioners and the Respondent have both correctly stated the opinion of the Washington Court of Appeals. Respondent's statement more closely tracks the wording of the Court, while the Petitioners summarized the Court's opinion. Petitioner's statement, "The Court reasoned that because the discontinued standard at issue is a question of vesting under Washington law * * *" is correct. "Discontinuance" is one way to lose the right to a non-conforming use under Washington law, Oregon law, and the National Scenic Area standards. According to the Court of Appeals, a non-conforming use is called a "vested" right under Washington law. Hence under Washington law, whether a use is discontinued would be a vesting question.

This question of the relationship between vested rights and non-conforming uses (whether it be Washington's "law of vested rights" or "vested rights doctrine") only further illustrates the question presented in the Petition. Analyzing the relationship between these two concepts under *Washington* law produces the result that the Gorge Commission must apply state law to non-conforming uses because the Gorge Commission does defer to state law for vesting standards. However, analyzing the relationship between the two concepts under *Oregon* law produces a very different result. In Oregon, non-conforming uses, while protected (*see e.g.* Or. Rev. Stat. § 215.130) are not "vested rights." Once "vested," the land use exists and may be lost under different statutory and local government non-conforming use standards. *See e.g. Eklund v. Clackamas County*, 583 P.2d 567 (Or. App. 1978) and *Fountain Village Development Co. v. Multnomah County*, 31 P.3d 458 (Or. App. 2001).[1]

---

[1] Although the Court in *Fountain Village* did note the close relationship between "vested rights" and the reason for "non-conforming use" standards, it nevertheless recognized that in Oregon these concepts address very different problems.

Another way of stating the issue is that Washington and Oregon use different terms; Oregon simply does not used the term "vested rights" to describe non-conforming uses. This case well-illustrates the difficulties of interpreting regional law under state law standards and terminology. State law and terminology should not be used to determine whether a fact pattern invokes an interstate compact standard; that should be the job of the Gorge Commission, which was created by the states to develop and ensure uniform application of land use standards. This Court should grant the Petition for Certiorari to clarify whether one state can force an interstate compact agency to interpret its standards only in accordance with that state's laws and terminology, especially when doing so conflicts with the very purposes of the compact.

Second, Respondent asserts that the Petitioners mischaracterize the arguments below. Petitioners noted in the Petition that Skamania County did not argue below that Washington's law of vested rights controls discontinuance of a non-conforming use. Pet. Br. 12 at n. 7. The Court of Appeals, in the instant case, developed that reasoning for the case *sua sponte*. App. 11a-14a. Petitioners stand by their argument; Respondents adopted this reasoning only after the Court of Appeals suggested at oral argument that this case should be controlled by the Commission's vesting provision.

II. RESPONDENT'S ASSERTION THAT THE GORGE COMMISSION SHOULD MERELY CLARIFY ITS RULES DOES NOT RESOLVE THIS CASE.

Throughout its opposition brief, Respondent argues that this Court need not accept this case because the Gorge Commission can and should be encouraged to simply have clear standards. Petitioners disagree. If the standard was so clear, why did Respondents not raise it on their own merit? Additionally, as noted above, Oregon law and terminology drastically differs from Washington in this respect.

More importantly, even if the standard were so clear that it did not require interpretation, the case would still raise the question of whether the Gorge Commission must apply state law. The Washington Court of Appeals gave six reasons why it believed the Gorge Commission must apply Washington's common law. The first five reasons cited by the Washington Court of Appeals relate solely to the "intent" of the Columbia River Gorge Compact. App. 8a–11a. Had the Court not interpreted the Compact then Respondent would be correct. But the Court's decision appears to be quite broad in holding that the Gorge Commission must interpret its standards in accordance with Washington's common law. The Washington Court of Appeals' parochial interpretation of the Columbia River Gorge Compact is precisely the type of interpretation of interstate compacts that this Court has said that a state cannot have the final word. *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

Respondent even asserted that "[t]he Gorge Commission may have already initiated the rulemaking process of amending its Management Plan to correct any perceived errors in the Washington Court of Appeals' interpretation." Opp. Br. 8. The Gorge Commission has begun reviewing the Management Plan in accordance with the National Scenic Area Act's requirement to do so every ten years. 16 U.S.C. § 544d(g). One of the categories of issues that the Gorge Commission has determined it will review is issues that have the subject of litigation. The issue of vested rights and nonconforming uses will be reviewed. However, the Management Plan review probably cannot correct the decision of the Washington Court of Appeals to the extent it requires the Gorge Commission to always interpret the terms of the Management Plan in accordance with Washington's common law.

Finally, Respondent argued that this case is limited to the "discontinued" standard at issue because "[p]etitioners have

not cited to, and respondent is unaware of, any other Management Plan provision which compels state law." Opp. Br. 7. This would be a good argument for the Respondent, *if it were true*. But Respondent forgets that it has already asserted to the Gorge Commission that this case and state law controls other Gorge Commission determinations, specifically what is a "parcel" of land in the National Scenic Area, even though the Gorge Commission has defined the term "parcel." Petitioners attach as Exhibit 1, a letter from Bradley Andersen, Skamania County Prosecutor and Attorney for Respondent, to the Columbia River Gorge Commission. Mr. Andersen wrote:

> In *Skamania County v. Woodall*, 16 P.3d 701 (Wash. App. Div. 2 2001), the Court of Appeals found that matters not resolved though examination of the Scenic Area Act or the Management Plan should be resolved by applying Washington law. * * * The Court of Appeals was clear in its direction that the Gorge Commission must consider Washington's case law to interpret land-use ordinances, even if they arise within the Scenic Area.

Exhibit 1 at 4a. This letter was not part of the record reviewed by the Courts below and is attached solely to reply to Skamania County's assertion that the decision of the Washington Court of Appeals concerns only the "discontinued" standard, which can be corrected by the Gorge Commission through rulemaking.

Through its own actions, Respondent believes that the Court of Appeals' decision applies very broadly—even to terms that the Gorge Commission has defined. It only asserts a narrow holding at this time in asking this Court to deny the Petition for Certiorari.

CONCLUSION

As demonstrated by Exhibit 1, the decision of the Washington Court of Appeals could have impacts well beyond the "discontinued" standard, which cannot be anticipated and "corrected" by rulemaking. Even the "clearest" terms may require some interpretation. This case is all about whether the Washington Court of Appeals can unilaterally constrain the Gorge Commission to interpret the regional provisions of the Management Plan for the Columbia River Gorge National Scenic Area in accordance with Washington common law when doing so defeats the uniformity of standards called for in the National Scenic Area Act. This Court should grant the Petition for Certiorari to correct the decision of the Washington Court of Appeals and bring clarity to the question of when a state may impose its own laws on an interstate compact agency.

Respectfully submitted,

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EXHIBIT

EXHIBIT

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WRITTEN TESTIMONY OF SKAMANIA COUNTY PROSECUTING ATTORNEY BRADLEY ANDERSEN IN SUPPORT OF A CONSISTENCY DETERMINATION OF SKAMANIA COUNTY ORDINANCE 2000-11 (ANCIENT SUBDIVISIONS)

I. INTRODUCTION.

The Columbia River Gorge Commission has been asked to review Skamania County Ordinance No. 2000-11. This ordinance clarifies Skamania County Code ("SCC") Title 17 (Subdivision Title) to determine how and to what extent the County will recognize lots created prior to the modern subdivision and short plan regulations, colloquially referred to as "ancient subdivisions," This revision sets forth eight factors which the County must evaluate, on a case by-case basis, to determine whether a particular parcel, created by a pre-1937 subdivision, will be deemed valid. The clarification of SCC Title 17 merely reduces to writing what historically has been Skamania County's practice, and establishes clear and specific legislative standards, as recommended by the Washington State Attorney General, for review of such pre-1937 subdivision questions.

We believe you will find that this ordinance presents the County's best effort to legislatively clarify the issue of how to address ancient subdivision. This ordinance represents a reasoned and balanced approach to guide the County in evaluating these issues in the future. As endorsed by the Attorney General, this clarifying ordinance is consistent with

state law and does not run afoul of the Scenic Act or the Management Plan. Indeed, a finding that the amendment is inconsistent with the Management Plan will result in standard less review of pre-1937 subdivision located within the Scenic Area

II. ANALYSIS

A. The Executive Director Starts from the Wrong Premise.

The Executive Director's memorandum to you recommending against taking any action is misguided. Claire erroneously concludes that SCC Title 17 will not affect land-use within the Scenic Area and therefore no action is necessary. Make no mistake about it; Skamania County intends for this ordinance to have uniform effect on all lands located within and without the Scenic Area of Skamania County.

The Executive Director starts from the wrong premise. She argues that "the Title 22 definition of the 'Parcel' is more restrictive and thus prevails over the Title 17 definition of 'Lot' in accordance with SCC § 22.02.030.A.2." In fact, the definition of "parcel" in Title 22 is more expansive than, or at least the same scope as, the definition of "lot" in Title 17.

The Management Plan for the Columbia River Gorge National Scenic Area and Skamania County Code Title 22, defines "Parcel" as:

a. "Any parcel legally created by a short plat, partition or subdivision;

b. Any units of land legally created and separately described by deed or sales contract, deeds in lieu of foreclosure or judicial ruling prior to November 17, 1986, if there were do applicable planning, zoning and land division ordinances or regulations.

c. In the state of Washington, a unit of land created and separately described by deed or sales contract, deeds in lieu of foreclosure or judicial ruling after November 17, 1986 if the unit created was approved by the Gorge Commission or the Forest Service Scenic Area Office."

SCC 22.04(100); Glossary to the Management Plan for the Columbia River Gorge Scenic Area.

Since a "parcel" includes lots that were "legally created by . . . subdivision", it is clear that lots created by pre-1937 subdivisions fit within the definition of parcel, provided they have not been lost through abandonment or non-use. The question therefore is whether the regulatory agency can or should recognize parcels created by pre-1937 subdivision. The answer depends upon the individual circumstances and history surrounding that particular parcel, which necessarily requires a case-by-case analysis.

The Management Plan and SCC Title 22 do not distinguish between parcels created before or after 1937. The Management Plan and SCC Title 22 parcel definition *does not* exclude subdivisions created prior to 1937. If the Management Plan and SCC Title 22 intended to exclude pre-1937 subdivisions, it could have been written so as to limit the definition of "parcel." Instead, the definition incorporates all "parcels" recognized by pre- or post-1937 subdivision.

Indeed, the clarifying ordinance will actually serve to define what pre-1937 "lots" should be considered parcels through applying the eight carefully crafted factors. SCC Title 17 does not create the subdivision or lots, but merely provides standards for use in identifying those subdivisions and lots created prior to 1937 that are no longer valid.

B. Nothing. in the Scenic Act or the Management Plan Addresses the issue of Undeveloped pre-1937 Subdivisions

Neither the Scenic Act nor the Management Plan speaks to when the land divisions affected by a pre-1937 subdivision should be determined as having no effect. Given this void, it is appropriate for such determinations to be made by Skamania County, the jurisdiction charged with administering land use in Skamania County through its Scenic Ordinance, other county ordinances, and Washington state law. This conclusion flows not only from the administrative system established by Congress in the Scenic Act, but also from the Washington Court of Appeals. In *Skamania County v. Woodall*, 16 P.2d 701 (Wash. App. Div 2 2001), the Court of Appeals found that matters not resolved through examination of the Scenic Act or the Management Plan should be resolved by applying Washington law. This approach is the approach used by Skamania County in its amendment to Title 17. The Court of Appeals was clear in its direction that the Gorge Commission must consider Washington's case-law to interpret land-use ordinances, even if they arise within the Scenic Area.

C. Skamania County's Title 17 Adopts the Approach Endorsed by the Washington .Attorney General's Office.

Between 1973 and 1998, the Washington Attorney General's office issued three written opinions addressing pre-1937 subdivisions. The third opinion, issued in 1998, concluded there was no legal basis to require counties to "dishonor" those subdivisions platted before 1937. AGO 1998 No. 4. Taken together with the analysis in the two

earlier opinions, the Attorney General's opinions present three important conclusions:

- no bright line rule can be distilled by which counties can determine whether parcels created by pre-1937 subdivisions should be considered invalid;
- recognition of pre-1937 subdivisions should be considered on case-by-base basis; and
- County ordinances addressing pre-1937 subdivisions should set out clear substantive standards

AGLO 1974 No. 7; AGO 1996 No. 005; AGO 1998 No. 4.

In adopting it changes to Title 17, Skamania County has merely recognized and adopted the analysis set out in the three Attorney General's opinions. Unlike the Scenic Act or the Management Plan, Title 17 sets out clears substantive standards as suggested by the three opinions. In fact, this new ordinance's factors closely track the suggested factors contained in the 1998 opinion. *Compare Skamania County* Ordinance No. 2001-11 with AGO 1998 No. 4 ("There are too many variables for us to suggest any fixed 'bright line' . . ."). In adopting the analysis from the Attorney General's opinions, Skamania County is applying the best available legal analysis in the state of Washington addressing pre-1937 subdivsions.

The approach suggested by Executive Director Puchy would leave a legal void with respect to pre-1937 subdivions within the Scenic Area. This approach is contrary to the suggestion of the Washington Attorney General's office, and is a standard less approach. Without standards, the courts, and not the legislative bodies, will be left having to define the applicable guidelines to assess future question relating to the validity of "parcel." This is unnecessary and perhaps irresponsible. We, as legislative bodies, have a responsibility to provide this guidance to those who must review these issues.

A. Skamania County's Approach Mirrors Oregon's Approach and therefore Provides for a Uniform System of Laws.

The approach that Skamania County adopted in SCC Title 17 to evaluate parcels created by pre-1937 subdivisions on a case-by-case is identical to the approach used in the State of Oregon. In 1973, the Oregon legislature adopted an "Undeveloped Subdivision" law whose purpose was to ensure old, undeveloped subdivisions complied with current comprehensive planning and zoning ordinances. ORS 92.205-92.234. The statute sets forth a procedure for bringing the undeveloped subdivisions up to current standards. Significantly, however, these updating procedures are not required if the old subdivision remains operative and has been developed in some way. ORS 92.225. The statute sets forth five factors that shall be considered in determining whether a subdivision either qualifies as developed or is undeveloped and must conform to current land use laws. The statute provides:

> "(2) For the purposes of this section, the lands described in the plat of any subdivision under review shall be considered to be developed if any of the following conditions are found by the agency or body conducting the review to exist on such lands:
>
> (a) Roadways providing access into and travel within the subdivision have been or are being constructed to meet the specifications prescribed therefor by the agency or body that approved the plat of the subdivision;
>
> (b) Facilities for the supply of domestic or industrial water to lots created by the subdivision have been or are being constructed;
>
> (c) Sanitary sewerage disposal facilities have been or are being constructed for lots created by the

> subdivision, or septic tanks have been or are being installed on the land or permits have been issued for their installation on the land;
>
> (d) Buildings have been or are being constructed upon the land or permits have been issued for the construction of buildings upon the land; and
>
> (e) One or more lots described in the plat of the subdivision have been sold or otherwise transferred prior to the date of the initiation of such review."

ORS 92.225(2).

The five factors in the Oregon statute are similar to the eight factors set out in SCC Title 17. For example, ORS 225.225(2)(a) requires the agency or governing body to consider roadways in determining whether the subdivision is undeveloped. Similarly, SCC Title 17.08.010(11)(6) requires the County to evaluate whether "there has been any private or public recognition of the lots created by the pre-1937 plat by way of roads or other infrastructure." Under ORS 92.225(2)(e) the agency or governing body evaluates whether any of the lots have been sold or otherwise transferred prior to the date of initiation of the review. Similarly, Title 17.08.010(11)(1) and (3) requires the County to evaluate the sale and transfer of the lots in determining whether a legally valid lot exists.

Finding Skamania County's Title 17 amendment to be consistent with the Management Plan would provide for a system in Skamania County which is consistent with the approach mandated by statute in the three Oregon Scenic Area Counties. Consistency between the two states within the Scenic Area is one of the fundamental reasons for creation of the Scenic Area. Management Plan at p. 3 ("To achieve the purposes of the Scenic Area Act, Congress called for preparation of a Management Plan that would treat the two-state, six-county areas as a region.").

VI. CONCLUSIONS

No provision of the Management Plan or the Scenic Act is compromised by Skamania County's Title 17 amendment The amendment, which fully adopts the best available legal analysis on Washington state law pertaining to pre-1937 subdivisions, applies countywide. The amendment provides standards to situations which by their nature require fact-specific, case-by-case inquires. Without this ordinance, decision makers will be left standard less which will result in arbitrary and dissimilar decisions.

I hope you agree that this legislative clarification establishes an approach which mirrors Washington and Oregon law and which promotes a regional consistency on the issue of older undeveloped or partially undeveloped subdivisions. On their four corners, the Management Plan's and the County's Scenic Ordinance's definition of "Parcel" clearly can be construed to include parcels created by pre-1937 subdivisions. However, the Management Plan fails to address whether such parcels should, under certain circumstances, not be recognized as separate parcels. Skamania County's Title 17 amendment provides clear guidance on the factors to be used in making this determination, and is fully consistent with, Washington law, Oregon law, the Scenic Act [1], and the Management Plan. The Gorge Commission should find Skamania County's amendment to Title 17 to be consistent. Therefore, Skamania County hereby requests that you either not take action [2], or affirmatively find that the ordinance is not inconsistent with the Management Plan or the Gorge Act.

---

[1] It is important to point out that nothing in the Gorge Act purports to address this issue. The County's ordinance therefore cannot be viewed as being inconsistent with the Act.

[2] Section 7 of the Gorge Act provides that, [s]hould the [Gorge Commission] fail to take action the ordinance shall be deemed to be approved."

(6)

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OCTOBER TERM, 2001

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Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

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BRIEF OF THE STATE OF OREGON AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Congress authorized the States of Oregon and Washington to enter into an interstate compact to develop uniform land use planning standards in the Columbia River Gorge National Scenic Area to protect the area's scenic, cultural, natural, and recreational resources, and to promote growth to occur in existing urban areas. The Columbia River Gorge Commission is the interstate compact agency created by Oregon and Washington. Congress and the States require the Commission to develop uniform standards, approve county ordinances as consistent with the standards and hear appeals concerning counties' application of their ordinances. The Washington Court of Appeals, however, determined that the Gorge Commission, in its appellate role of reviewing local land use decisions for compliance with county ordinances, must interpret those ordinances in a manner consistent with Washington's law, rather than with the Gorge Commission's own standards. The question presented is therefore:

Under an interstate compact that does not reserve the states' individual land use standards, is the compact agency entitled to interpret local ordinances implementing the Commission's standards in a uniform manner to achieve the purposes of the Compact, even if that interpretation conflicts with state law?

This is an issue of first impression for this Court; in 1997, this Court denied the Delaware River and Bay Authority's petition for a writ of *certiorari* presenting a substantially similar issue.

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INTEREST OF THE STATE OF OREGON

Over the passage of millennia, the Columbia River carved through the Cascade Mountains a spectacular canyon worthy of ongoing national protection. This majestic waterway also serves as the political boundary between the States of Washington and Oregon. That simple geopolitical fact not only has complicated the long and arduous process of achieving consensus between Congress and the two states on how best to protect the Gorge, but it also has necessitated the creation of an interstate commission to ensure the uniform stewardship of land within the Columbia River Gorge National Scenic Area. It is the carefully forged legal balance reflected in the Columbia River Gorge Compact that the decision of a single state court now threatens.

Resolution of the question presented by petitioners Chris Woodall and Columbia River Gorge Commission is vital for the future resolution of land use disputes that will arise in the Columbia River Gorge National Scenic Area. Because the state land use laws of Oregon and Washington differ significantly, the Washington Court of Appeals' decision virtually ensures that land will not be developed in a consistent manner on both sides of the river.

Whether the Columbia River Gorge Commission may interpret terms in county ordinances in a manner that achieves consistency with the National Scenic Area's Management Plan is of great importance to Oregon. When citizens of Oregon and tourists who flock to Oregon look across the Columbia River from the Oregon side, they should not perceive a landscape differing radically from that seen by those looking from the Washington side.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Columbia River Gorge National Scenic Area is a treasure that belongs to the entire nation, although situated between the States of Oregon and Washington. The Columbia River Gorge embraces within the National Scenic Area breathtaking vistas, monumental geology, spectacular waterfalls, diverse wildlife and habitat, forests and farmland. The Columbia River is a major conduit of commerce in the Pacific Northwest, and the National Scenic Area is itself a stunning segment of that conduit. It is a unique resource worthy of ongoing protection under the interstate compact that Congress authorized and the States of Oregon and Washington adopted.

Under the provisions of the Columbia River Gorge Compact, the Columbia River Gorge Commission is the steward of the National Scenic Area. The Gorge Commission is vested with the authority and the duty to ensure that land use planning within the area is uniformly coordinated. The Gorge Commission does so by disapproving county ordinances that are not consistent with its National Scenic Area Management Plan. And when it reviews county determinations applying county ordinances, the Gorge Commission may interpret the ordinances to achieve consistency with the Management Plan to protect the Gorge, even if that would differ from the interpretation that state courts would reach by applying their own state's common law.

The Washington Court of Appeals reached a contrary conclusion in deciding that the Gorge Commission must interpret county ordinances by applying Washington's common law instead of uniformly applying the Management Plan. The Washington Court of Appeals' decision in this case will inevitably unravel the uniformity of management under the stewardship of the Columbia River Gorge Commission.

Short of this Court's intervention, Washington state courts will pursue their own interpretation of the Gorge Commission's authority concerning county ordinances on the Washington side of the river. Were Oregon courts to follow suit, they would pursue their own interpretation of county ordinances on the Oregon side. Even if Oregon courts agreed with the Gorge Commission that county ordinances must be interpreted to be consistent with the Management Plan, the result would be non-uniformity of land use planning in the Columbia River Gorge area. That is the antithesis of what Congress, Washington and Oregon intended in creating the Columbia River Gorge Commission as the steward for the National Scenic Area.

Only this Court can now resolve the question of the authority of the Columbia River Gorge Commission in a manner that will be binding on both Washington and Oregon courts. Under the provisions of the National Scenic Area Act and the Gorge Compact, this underlying land use dispute could arise only in state courts, not federal district courts. If Oregon and Washington were forced to litigate the issue between them directly, this Court would have original and exclusive jurisdiction. But this Court need not wait until one state sues the other. It can and should resolve the matter now by granting *certiorari* in the case at hand.

ARGUMENT

I. The Columbia River Gorge is a unique, national treasure worthy of ongoing protection.

The Columbia River is the largest river in the country flowing into the Pacific Ocean. It passes virtually at sea level through the second biggest mountain range in the United States outside of Alaska. 132 CONG. Rec. 32,214 (1986).

The Columbia River Gorge was formed two million years ago, when the Cascade Mountain range erupted and huge ice dams broke, sending floods westward. *See* Tolan and Beeson, *Exploring the Noegene history of the Columbia River: Discussion and Geologic Field Trip Guide to the Columbia River Gorge*, 46 OR. GEOLOGY 95 (1984). The resulting gorge is nearly one mile deep.

In 1806, Captain Meriweather Lewis described with awe the monumental rock formations and scenic beauty of the area he explored in his famous expedition with William Clark through the Columbia River Gorge:

> on our way to this village we passed several beautifull cascades which fell from a great hight over the stupendious rocks which closes the river on both sides nearly, except a small bottom on the South side in which our hunters were encamped. the most remarkable of these casscades falls about 300 feet perpendicularly over a solid rock into a narrow bottom of the river on the south side. it is a large creek, situated about 5 miles above our encampment of the last evening. several small streams fall from a much greater hight, and in their decent become a perfect mist which collecting on the rocks below again become visible and decend a second time in the same manner before they reach the base of the rocks.
>
> the mountains through which the river passes nearly to Cataract River are high broken rocky, particularly covered with fir and white cedar, and in maney places very romantic seenes. Some handsom cascades are seen on either hand tumbling from the stupendious rocks of the mountains into the river.

ORIGINAL JOURNALS OF THE LEWIS AND CLARK EXPEDITION 1804–1806, Volume 4, Part II, April 9 & 14, 1806, pp. 259–60 and 281 (Dodd 1905) (original spelling).

The river the explorers traveled down now marks the boundary between Washington and Oregon. It is important to those two states not only for historic reasons but also as a conduit of commerce and as the site of fisheries, agriculture and forestry. As Senator Mark Hatfield said when the Columbia River Gorge National Scenic Area Act was being debated in Congress:

> [The Columbia River Gorge] is the location of some of the most wondrous scenic vistas in North America as well as the home of over 44,000 people. The hundreds of millions of dollars worth of commercial activity which occurs there has contributed to the area's attractive livability. Unfortunately, the Columbia [River] Gorge is also a bull's-eye for some who would develop it in a way that would destroy forever the very qualities which make the gorge a supremely special place in a land blessed with abundant, but ever-threatened natural wonders.

132 CONG. REC. 29,496 (1986).

The Columbia River and its tributaries support substantial fisheries at all times of the years. *Draft Management Plan*, Columbia River Gorge National Scenic Area, U.S. Department of Agriculture, Forest Service (1990) (hereinafter U.S.F.S.) at 32. Agricultural land lies mostly in the eastern end of the Columbia River Gorge area, where soils are good, abundant water is available and prime orchard lands are located. *Id.* at 40. Large tracts of forestland are found in the western area. *Id.* at 46–48.

The Gorge is a highly celebrated tourist attraction dating back to the 19th century. John Muir wrote in 1888:

> [T]he great river of Oregon draws crowds of visitors, and is never without enthusiastic admirers to sound its praises. Every summer since the completion of the first overland railroad, tourists have been coming to it in ever increasing numbers, showing that in estimation the Columbia is one of the chief attractions of the Pacific Coast, and well deserves the admiration so heartily bestowed upon it. The beauty and majesty of its waters and the variety and grandeur of the scenery through which it flows, lead many to regard it as the most interesting of all the great rivers of the continent * * *.

BASIN OF THE COLUMBIA RIVER 407 (Dewing 1888).

The sense of drama generated by the Columbia River Gorge is immortalized in the first verse of "Roll On, Columbia!," written by Woodie Guthrie in 1949 and designated by the State of Washington in 1987 as its official folk song:[1]

> Green Douglas firs where the waters cut through,
> Down her wild mountains and canyons she flew.
> Canadian Northwest to the ocean so blue,
> It's roll on, Columbia, roll on!

And the Columbia River Gorge National Scenic Area is truly a national treasure that attracts visitors from all over. Multnomah Falls, 620 feet high, is the second-highest year-round waterfall in the country. It is also Oregon's most-visited

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[1] *See* State of Washington, *The Symbols of Washington State, at* http://www.leg.wa.gov/legis/symbols/symbols.htm.

tourist site. Petty, *Even in wet winters the Columbia River Gorge is enchanting*, Associated Press, January 17, 2002, *in* http://www.enn.com/news/wire-stories/2002/01/-0172002/ap_46134.asp. As noted in that recent Associated Press news article, "Many visitors view the gorge's wonders by driving along the Historic Columbia River Highway, a two-lane road that snakes past waterfalls, over hillsides, and to the tops of 900-foot cliffs. The road was designed in 1913 specifically to spotlight the gorge's scenery."

The Columbia River Gorge contains myriad other valuable resources. The geology of the Gorge has created a diversity of habitat for vegetation and wildlife. The Gorge contains rare as well as wild and endangered animal species, including the pine marten and western gray squirrel. Blair, *The Columbia River Gorge National Scenic Area: The Act, Its Genesis And Legislative History*, 17 ENVT'L L. REV. 863, 870 (1987). In addition, falcons, bald and golden eagles, swans and great blue heron soar over the promontories of this magnificent habitat. Blair, 870. Over 800 species of wildflower, some of which are endangered, others of which are found nowhere else, bloom in colorful abundance. 132 CONG. REC. 32,218 (1986); U.S.F.S., 33; Blair, 869. Vast forests at the western end of the Gorge are juxtaposed against golden, wheat colored hills rising in the east. 132 CONG. REC. 32,218 (1986).

Significant cultural resources are also found along both sides of the Columbia River. 132 CONG. REC. 32,222 (1986). Over four hundred recorded, prehistoric archaeological sites document human occupations from centuries past and attest to the area's importance to Native Americans who have inhabited the area for anywhere from 10,000 to 20,000 years. Minor, *A Resource Protection Planning Process Identification of Prehistoric Archaeological Resources in the Lower Columbia*

Study Unit (1986), p. 14; Blair, 870. Of those sites, slightly over half are on private, county, state and federal lands other than those administered by the National Forest Service. Native Americans continue to maintain their cultural identity within the Gorge. U.S.F.S., 30. Commercial, subsistence and ceremonial fishing is a right reserved by the tribes under the treaties of 1855. *Id.*; 132 CONG. REC. 32,222 (1986).

Given the multiple valuable resources found within the Columbia River Gorge, there can be no doubt that it is a unique treasure that belongs neither solely to the State of Oregon nor to the State of Washington, but to the entire nation. It is eminently worthy of ongoing protection.

II. The Columbia River Gorge Commission is the steward of the National Scenic Area vested with authority to ensure that land management is uniformly coordinated.

Efforts to bring regional planning to the Columbia River Gorge date back to 1893, when Congress created the Cascade Range Forest Reserve, which later became the Mount Hood National Forest. U.S.F.S. at 3.

Past efforts to manage the Gorge's resources through merely advisory bodies have failed. Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area Act: The Act, Its Genesis and Legislative History*, 17 Envt'l. L. 863, 878–79 (1987). In the 1950s, each state formed its own gorge commission. The two bodies eventually shared staff and an office and sought to cooperate as much as possible under their separate enabling legislation. Nonetheless, as early as 1970, the Governors of the two states and the two gorge commissions themselves were advocating an alternative model based on enforcing a *single* management plan for the Gorge. *Id.* at 879. A key document during the congressional debate over the cur-

rent Act was a joint position paper developed by the two gorge commissions. It stated that the legislation "must recognize the need for a *single management structure* capable of ensuring the protection of the region's unique values by melding local, state and national interests." Oregon and Washington Columbia River Gorge Commissions, Position Paper on Gorge Legislation (Feb. 1986) (emphasis added).

After years of tentative efforts, a consensus developed in support of protecting the Columbia River Gorge by creating an interstate agency with authority to manage the natural resources on both sides of the river. 16 U.S.C. § 544 *et seq.* (1986). 132 CONG. REC. 32,192–93 (1986). Congress approved the Columbia River Gorge National Scenic Area Act on October 17, 1986, and President Reagan signed it on November 17, 1986.

Congress specified that the purpose of the Columbia River Gorge National Scenic Area Act is two-fold. First, the Act establishes a National Scenic Area to protect and provide for the enhancement of the scenic, cultural, recreational, natural resources of the Columbia River Gorge. Second, the Act protects and supports the economy of the National Scenic Area by encouraging growth to occur in existing urban areas and by allowing future economic development consistent with the first purpose. 16 U.S.C. § 544a.

The Act designates a portion of the Columbia River Gorge as a National Scenic Area, divided into three categories: (1) urban areas that the Act exempts from regulation; (2) special management areas that are placed under the jurisdiction of the Secretary of Agriculture; and (3) other lands that the Act

subjects to the jurisdiction of the Columbia River Gorge Commission. 16 U.S.C. § 544b.[2]

The Act contains the advance consent of Congress to a compact between Oregon and Washington, and the two states were authorized to create an interstate agency, the Columbia River Gorge Commission, with regulatory responsibility for the natural resources within the National Scenic Area. 16 U.S.C. § 544c; *see also* U.S. CONST., art. I, § 10, cl. 3 (Compact Clause). As a condition to its consent, Congress has required that the Gorge Commission carry out its powers and duties in accordance with prescribed standards in the Act and that Washington and Oregon vest in the agency the authority necessary to carry out the purposes of the Act. 16 U.S.C. § 544c.

The Act confers on Washington and Oregon authority to establish the Columbia River Gorge Commission, composed of six members appointed by the Governors and six members by the counties. 16 U.S.C. § 544c. The Act requires the Columbia River Gorge Commission to make land use designations based on a series of studies. 16 U.S.C. § 544d. The Act directs the Commission to designate land used or suitable for agriculture, forests, open space, commercial development and residential development. 16 U.S.C. § 544d(b). The Act requires the Commission to adopt a Management Plan for the National Scenic Area based on standards contained in the Act. 16 U.S.C. § 544d(c), (d).

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[2] The National Scenic Area straddles the Columbia River and is about 85 miles long and ten miles wide. Lynch, *Trailer court case could alter political scenery in gorge*, THE OREGONIAN (February 24, 2002). The urban areas include 13,000 acres, the special management areas 112,000 acres, and the remaining areas 113,000 acres. 99 CONG. REC. H 10485 (Oct. 16, 1986).

For purposes of this case, one of the most important provisions of the Act is that each county is required to adopt land use ordinances consistent with the Columbia River Gorge Commission's Management Plan. 16 U.S.C. § 544e. The Gorge Commission must approve all county ordinances affecting non-federal lands within the National Scenic Area as being consistent with the Management Plan. 16 U.S.C. § 544e.

In authorizing the Gorge Compact on the foregoing terms, Congress mandated, and both Oregon and Washington agreed, that each state would relinquish its hegemony *vis-à-vis* land use planning and regulation in the National Scenic Area. Congress thus mandated a regional approach coordinated under the Gorge Commission's Management Plan, which the states necessarily agreed to in adopting the Compact.

III. The Washington Court of Appeals' decision will unravel the uniformity of management under the stewardship of the Columbia River Gorge Commission.

A. The Columbia River Gorge Commission necessarily has the authority to require Skamania County to apply its ordinance in a manner that makes it consistent with the Management Plan.

There is no dispute in this case that Congress, Oregon and Washington established the Columbia River Gorge Commission and gave it significant management and oversight responsibilities concerning land use planning within the National Scenic Area. Nor is there any question but that in reviewing county ordinances for consistency with the Management Plan, the Gorge Commission has the authority to require county ordinances to comply with that plan. 16 U.S.C. § 344e.

The issue is whether the Gorge Commission can require that counties, in interpreting and applying their ordinances, must do so in a manner that is consistent with the National Scenic Area Management Plan.

In this case, the Skamania County Board of Adjustment determined that a ten-site trailer park was a use that had not been discontinued within the meaning of its ordinances governing non-conforming uses. The Board of Adjustment concluded that the term "discontinue," which is not defined in the county's ordinance, must be interpreted consistently with Washington common law. Because Washington common law requires that the owner must subjectively intend to abandon the use, and because no subjective intent had been shown, the Board ruled that the use had not been discontinued.

In reviewing the county's determination, the Gorge Commission, applying the National Scenic Area's Management Plan, reached a different conclusion. The Gorge Commission ruled, and the Skamania County Superior Court agreed, that a nonconforming use in the National Scenic Area is discontinued upon cessation of use for one year—an objective standard.

Had Skamania County proposed in its ordinance to define "discontinued use" as requiring the landowner's subjective intent to abandon the use, coupled with non-use in fact for a one-year period, the Gorge Commission clearly would have had the authority to require Skamania County to drop the subjective intent requirement. That is because such a requirement, although consistent with Washington law, would have been inconsistent with the Management Plan.

The question posed in this case is thus whether the Gorge Commission can require Skamania County to interpret its ambiguous ordinance in a manner that makes it consistent with

the Management Plan, even if that interpretation is not consistent with Washington's common law. The State of Oregon submits that the answer to that question is clearly "yes." Only a "yes" answer to that question ensures the uniformity of land management envisioned by Congress and the two states within the National Scenic Area.

The Washington Court of Appeals held, however, that Skamania County properly applied Washington state judicial interpretations of the meaning of "discontinued use," even though those interpretations conflict with the Gorge Commission's Management Plan. The State of Oregon does not believe that the Court of Appeals' holding can withstand scrutiny.

Under the terms of the Act, the Gorge Commission has the authority not only to disapprove county ordinances that are inconsistent with the Management Plan but also to reverse county land use decisions based on interpretations of county ordinances that are inconsistent with the Plan. Further, the Gorge Commission is not bound by state judicial decisions that might lead to a different interpretation.

Were it otherwise, regional land use planning within the Columbia River Gorge would unravel. Coordinated land use planning would be replaced by a series of conflicting state court decisions on land use matters that affect the integrity of this National Scenic Area. See discussion *post*.

The Gorge Commission in this case correctly reversed the Skamania County Board of Adjustment's approval of the nonconforming use. The Washington Court of Appeals, in exercising its limited judicial review authority under the Columbia River Gorge National Scenic Area Act, erred in reversing the Gorge Commission's decision.

B. The Washington Court of Appeals' decision will undermine uniformity of land use decisions in the National Scenic Area.

Congress recognized that the resources of the Columbia River Gorge were not previously being protected under the two states' different land use planning systems. 132 CONG. REC. 29,498 (statements of Senator Packwood (OR) and Senator Evans (WA)). Congress therefore created a new paradigm of land use management in the National Scenic Area by requiring a uniform set of land use standards applicable throughout the two-state, six-county region.

The Washington Court of Appeals' decision will inexorably undermine the uniformity of land use decisions in the National Scenic Area. The decision of the Washington Court of Appeals explicitly allows Washington common law to be applied only on the Washington side of the Columbia River. When Congress and the two states created the Gorge Commission as the steward of land use management within the National Scenic Area, they did not envision two different sets of land use laws, one on each side of the Columbia River,

The Washington Court of Appeals' decision will tend to produce exactly the outcome that Congress and both states rejected. That is, county ordinances will be interpreted differently, depending on which side of the Columbia River they apply. Neither state agreed to that result in adopting the Gorge Compact. Rather, both states agreed to give up their respective hegemonies *vis-à-vis* land use planning and regulation in the National Scenic Area, in favor of a regional approach coordinated under the Management Plan. Coordinated land use planning within the National Scenic Area requires that county ordinances must be approved and definitively interpreted by the Gorge Commission.

IV. This Court is the only court that can resolve the question of the authority of the Columbia River Gorge Commission to ensure uniformity of land use decisions within the National Scenic Area.

Only this Court can resolve the question of the authority of the Columbia River Gorge Commission in a manner that will be binding on both Washington and Oregon courts in this case. Short of this Court's intervention, Washington state courts will pursue their own interpretation of the Gorge Commission's authority concerning county ordinances on the Washington side of the Columbia River within the National Scenic Area. Oregon courts might pursue their own interpretations of county ordinances on the Oregon side within the National Scenic Area. Even if Oregon courts properly deferred to the Gorge Commission, the result would be non-uniformity. That is the antithesis of what Congress, Washington and Oregon intended in creating the Columbia River Gorge Commission as the steward of coordinated land management within the National Scenic Area.

Because the Gorge Compact itself provides that state courts have exclusive jurisdiction over appeals from Gorge Commission decisions, 16 U.S.C. § 544m (6), this type of land use dispute could not arise in the federal courts. Hence, unless one state were to sue the other, the issue presented here could arise only in this context, where a state court has applied state common law to interpret a county ordinance, rather than defer to the Gorge Commission's definitive interpretation of the ordinance.

If the meaning of the Gorge Compact were to arise in the context of litigation directly between the States of Oregon and Washington, this Court would have original and exclusive jurisdiction. U.S. CONST. art. III, § 2, cl. 2 ("In all cases * * * in which a state shall be Party, the Supreme Court shall have original jurisdiction"); 28 U.S.C. §1251(a) ("The Supreme

Court shall have original and exclusive jurisdiction of all controversies between two or more States").

The State of Oregon does not consider that the States of Oregon and Washington are in direct conflict on this issue at this point, although the State of Oregon does disagree with the opinion of the Washington Court of Appeals. The exclusive jurisdiction of this Court over litigation between two states serves, however, to underscore that this Court would indeed be the appropriate court to resolve the dispute if it arose in that context.

Yet a case presenting the same issue is now at hand. There is no necessity for this Court to wait until one state sues another. This Court is in a position in this case to affirm the authority of the Columbia River Gorge Commission to insist on a uniform approach to land use management under the Gorge Compact, in order to discharge effectively its stewardship responsibilities for the unique national treasure of the Columbia River Gorge National Scenic Area.

CONCLUSION

The State of Oregon urges this Court to grant *certiorari* in this case.

Respectfully submitted,

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